European Stability Initiative
BERLIN - BRUSSELS - ISTANBUL

On the Eve of Judgement Day:

The ECJ and the Demirkan Decision on 24 September

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Executive summary

On 24 September 2013 at just after nine-thirty in the morning the Court of Justice of the European Union (or European Court of Justice, ECJ) will deliver a judgement in one of the most important cases it will decide this year. The outcome will affect millions of Turkish citizens. It could also have a profound impact on the future of the Schengen visa system.

At the centre of this court case is Leyla Ecem Demirkan, a 20-year old Turkish woman from the city of Mersin who asked the German consulate in Ankara for a visa in October 2007. Her request was denied.

This is a familiar story, experienced by tens of thousands of Turks every year: in 2012 the consulates of Schengen countries in Turkey rejected more than 30,000 Turkish visa applications. It is the young that suffer most from the visa obligation. Consulates are instructed by their capitals to beware of unmarried young people who travel, as they might be tempted to stay on after the expiry of the visa. While many Turkish civil servants and their dependants obtain special passports that allow visa-free travel to the EU the vast majority of young people and students do not have such passports.

Leyla Demirkan decided to go to court. There her lawyer argued that Germany did not have the right to demand a visa. Citizens of Turkey have rights based on the Association Agreement concluded in 1963 between Turkey and the EU's predecessor, the European Economic Community (EEC).

If the ECJ decides in Demirkan's favour on 24 September, it will not only allow her and other Turkish citizens to visit Germany without a visa. The same would apply, in all likelihood, to ten other EU member states.

On the eve of th judgement nobody can be sure how the court will decide. There are indications that the court will rule against Leyla Demirkan. Then again, if it takes her side it would not be the first time that the ECJ defies expectations.

This briefing explains the background to this case. It explains the context and sets out the arguments and the road to this decision. Following the announcement of the decision on Tuesday, 24 September, ESI will issue a detailed analysis of the ruling and of its consequences and implication for the goal of visa liberalisation for Turkish citizens.

For further questions please contact: info@esiweb.org

A young woman and the European court

On 24 September 2013 many eyes across the EU and Turkey will turn to Luxembourg. There, at just after nine-thirty in the morning, the Court of Justice of the European Union (or European Court of Justice, ECJ) will deliver a judgement in one of the most important cases it will decide this year.[1] The outcome will affect millions of Turkish citizens. It could also have a profound impact on the future of the Schengen visa system.[2]

At the centre of this court case is Leyla Ecem Demirkan, a 20-year old Turkish woman from the city of Mersin on the Mediterranean coast, who is today a student in Izmir. When Leyla was a teenager, her mother married a German, Jorg Huber. Leyla wanted to visit him and asked the German consulate in Ankara for a visa in October 2007.[3] Her request was denied.

Until here this is a familiar story experienced by tens of thousands of Turks every year. In 2012 the consulates of Schengen countries in Turkey rejected more than 30,000 Turkish visa applications.[4]

The story of Leyla is typical in another way, too: it is the young that suffer most from the visa obligation. Consulates are instructed by their capitals to beware of unmarried young people who travel, as they might be tempted to stay on after the expiry of the visa. The fact that Leyla assured the consular authorities that she had no such intention since she wanted to finish school in Turkey made no difference.

Many Turkish civil servants and their dependants obtain special passports that allow visa-free travel to the EU. There are some 1.2 million such passports in circulation.[5] However, the vast majority of young people and students do not have such passports.

In this case, however, the denial of a visa was not the end but the beginning of the story. Leyla's family knew Rolf Gutmann, a lawyer from Stuttgart. Gutmann had a history of defending the rights of foreign citizens before German courts and the ECJ.[6] At the time he was representing two Turkish truck drivers before the ECJ who, like Leyla, objected to the visa requirement. So Leyla decided to go to court with Rolf Gutmann as her lawyer.

As a lawyer Gutmann argued that Germany did not have the right even to demand a visa from Leyla. He insisted that citizens of Turkey have rights based on the Association Agreement

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1 This is ECJ case C-221/11, Leyla Ecem Demirkan v Germany.

2 The Schengen zone comprises 26 countries: 22 of 28 EU countries (all except Ireland, the UK, Bulgaria, Romania, Cyprus and Croatia) as well as 4 non-EU members (Iceland, Liechtenstein, Norway and Switzerland). Ireland and the UK do not participate in the borderless Schengen zone. Bulgaria, Romania and Croatia are due to join eventually. Cyprus will join once the division of the island is overcome.

3 The EU's Visa Regulation lists Turkey as one of the countries whose citizens need a visa to enter the Schengen zone. Holders of Turkish diplomatic, special and service passports are exempt from this requirement. They can enter the Schengen zone without a visa for stays of up to 3 months within a 6-month period. Council Regulation (EC) No 539/2001 of 15 March 2001listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, consolidated version.

4 The visa statistics are available on the website of the Directorate-General for Home Affairs of the European Commission, section "Schengen, Borders & Visas", subsection "Visa policy". On the "Visa policy" page, the statistics are right at the bottom.

5 According to the Turkish Ministry of Foreign Affairs, 1,236,275 special (green) passports and service (grey) passports were in circulation on 12 March 2012.

6 See website of Rolf Gutmann (in German).

concluded in 1963 between Turkey and the EU's predecessor, the European Economic Community (EEC). These included her right to visit Germany without a visa.

Turkish government officials have long argued that the Schengen visa requirement is illegal, violating the Association Agreement. In a newspaper article last year, Turkey's Minister for EU Affairs Egemen Bagis wrote:

> "Recent verdicts of the EU court of justice and the national courts of some member states ... have ruled that Turkish nationals have the right to visa-free travel. Why, then, are we still being ostracised?"[7]

In 2009 the first-instance court rejected Leyla's claim.[8] She filed an appeal to the Higher Administrative Court of Berlin-Brandenburg. This court concluded that the legal questions raised by her case were complex, involved EU law and required clarification – a "preliminary ruling" - from the highest court of the European Union, its Court of Justice in Luxembourg. Preliminary rulings make up the bulk of the rulings of the ECJ. EU institutions explain their importance:

> "The national courts in each EU country are responsible for ensuring that EU law is properly applied in that country. But there is a risk that courts in different countries might interpret EU law in different ways. To prevent this happening, there is a 'preliminary ruling procedure'. If a national court is in doubt about the interpretation or validity of an EU law, it may – and sometimes must – ask the Court of Justice for advice."[9]

In 2012, 386 out of 595 completed cases before the ECJ were preliminary rulings.[10] These preliminary rulings cannot be appealed. They are not only binding on the courts that referred the questions, but on all national courts of member states. In this way the court creates EU law that is immediately applicable across the EU.

The impact of preliminary rulings explains the high stakes in the Demirkan case. If the ECJ decides in her favour on 24 September, it will not only allow her and other Turkish citizens to visit Germany without a visa. The same would apply, in all likelihood, to ten other EU member states.

A strong association

In September 1963 the European Economic Community and Turkey signed an Association Agreement in Ankara.[11] This agreement, also known as the Ankara Agreement, entered into force on 1 December 1964. Its aim was "to "promote the continuous and balanced strengthening of trade and economic relations between the Parties." [12] The objectives included developing the Turkish economy and improving the level of employment and the living

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7 Egemen Bagis, "Visa restrictions are shutting Turkey out of the EU", The Guardian, 14 July 2012.

8 For the proceedings before the Administrative Court in Berlin, see Opinion of Advocate-General Cruz Villalon, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013.

9 "Europa website" of the EU institutions, section "Court of Justice of the European Union".

10 Court of Justice of the European Union, Annual Report 2012. Synopsis of the work of the Court of Justice, the General Court and the Civil Service Tribunal, 2013, p. 94.

11 Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963.

12 Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963, entry into force on 1 December 1964.

conditions of the Turkish people. The parties also aimed to create a customs union and to prepare Turkey for eventual EEC membership.

Half a century has since passed. The association agreement with Turkey is the farthest-reaching that the EU has ever concluded. The institutions created under the agreement still function. The Association Council - where the governments of Turkey and the EU member states, the European Commission and the Council are represented - continues to meet every year. Based on unanimity it takes binding decisions that develop the association further. The customs union, only a distant goal in 1963, was set up in 1995 and has since been taken for granted by countless entrepreneurs. Economic and trade relations have deepened at an ever accelerating pace, which has enabled millions of individuals to trade and to invest. In 2005 EU accession negotiations were launched.

The Ankara Agreement from 1963, an Additional Protocol in force since 1973, the decisions of the Association Council and ECJ case law make up the EU-Turkey association law. This body of law is legally binding for EU member states. It has supremacy over EU regulations and directives and over national legislation in the member states. Altogether, the ECJ has issued over 50 rulings concerning EU-Turkey association law.[13] It has played an important role in clarifying and strengthening the rights that this law confers on Turkish citizens concerning employment, residence and free movement in the EU.

In 1963, the Association Agreement envisaged moving gradually towards full freedom of establishment (the freedom to pursue an economic activity as a self-employed person and to set up and manage a company) and *freedom to provide services*.[14] Later the EEC and Turkey agreed an Additional Protocol to the Association Agreement, which entered into force on 1 January 1973. Its Article 41 stipulated:

> "The Contracting Parties shall refrain from introducing between themselves *any new restriction on the freedom of establishment and the freedom to provide services*."[15]

The same article also noted what needed to be done next:

> "The Council of Association shall ... determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services."[16]

Until today the Association Council has not determined any such timetable for the "progressive abolition of restrictions". Instead, article 41 has served as a "standstill clause",

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13 Kees Groenendijk & Elspeth Guild, Visa Policy of Member States and the EU Towards Turkish Nationals After Soysal, Revised and Updated Second Edition, Economic Development Foundation Publication No. 249, Istanbul September 2011, p. 11 and pp. 74-75.

14 The EEC too has pursued the same economic freedoms within its common market since its establishment in 1958. Treaty establishing the European Economic Community, signed in Rome on 25 March 1957, entry into force on 1 January 1958; for English, see an unofficial version.

15 Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force, signed in Brussels on 23 November 1970, entry into force on 1 January 1973.

16 Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force, signed in Brussels on 23 November 1970, entry into force on 1 January 1973.

preventing the parties from introducing new hurdles hampering the freedom of establishment and the freedom to provide services.

A victory in court – and a huge disappointment

At the time when the Additional Protocol entered into force in 1973, Turkish citizens enjoyed visa freedom. They could travel freely to all nine countries that made up the EEC – France, Germany, Italy, Belgium, Luxembourg, the Netherlands, Denmark, Ireland and the UK. In fact, they could travel freely to all Western European countries except Greece. They only needed a visa if they wanted stay longer than three months or work, even though there were exceptions to that, too.

This changed after the military coup in September 1980. The fear of thousands of Turkish political refugees coming to Europe led countries to impose visa requirements. Germany did so in 1980, together with France, Belgium, the Netherlands and Luxembourg. Others followed: Denmark in 1981, the UK and Ireland in 1989, Spain and Portugal in 1991.[17] When the EU established the Schengen zone and developed a common visa policy in the 1990s, the visa requirement for Turkish citizens became EU policy.

This visa requirement was only recently challenged in court by two Turkish lorry drivers, Mehmet Soysal and Ibrahim Savatli. Soysal and Savatli had long covered the route Turkey-Germany for a Turkish transport company. Until 2000 they had no problems to obtain Schengen short-stay visas from Germany. In 2001 and 2002, however, the German consulate repeatedly rejected their visa applications.

The case reached the ECJ. Rolf Gutmann, the German lawyer of Soysal and Savatli, argued that as providers of transport services they should not be required to have a visa anyway, in line with the standstill clause that bans new restrictions on the freedom to provide services. The ECJ agreed. When it issued its judgment in February 2009 it found that the visa requirement was indeed a new restriction:

> "... liable to interfere with the actual exercise of [the freedom to provide services], in particular because of the additional and recurrent administrative and financial burdens involved in obtaining such a permit which is valid for a limited time." [18]

It also recognised that as a new restriction it violated the standstill clause and thus EU law:

> "Article 41(1) of the Additional Protocol … is to be interpreted as meaning that it precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals such as the appellants in the main proceedings must have a visa to enter the territory of a Member State in order to provide services there on behalf of an

[17] Kees Groenendijk & Elspeth Guild, Visa Policy of Member States and the EU Towards Turkish Nationals After Soysal, Revised and Updated Second Edition, Economic Development Foundation Publication No. 249, Istanbul September 2011, p. 80.

[18] European Court of Justice, Judgment in the case Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland (Reference for a preliminary ruling from the Oberverwaltungsgericht Berlin-Brandenburg), Case C-228/06, 19 February 2009, paragraph 55.

> undertaking established in Turkey, since, *on that date, such a visa was not required.*"[19] [emphasis added]

This looked at the time like a breakthrough. All EU member states and EU institutions that had made submissions – Germany, Denmark, Greece, Slovenia and the European Commission – had argued against such a ruling. The Court of Justice had demonstrated its independence. "We have entered the EU in trucks!" titled the popular daily Sabah the next day.[20] "The first step to a Europe without visas," was the headline in the daily Vatan.[21] EU Affairs Minister Egemen Bagis told the press: "This decision is an important step to eliminate the concerns that EU authorities are behaving in prejudiced and biased way towards Turks and to establish a mutual partnership." He added that he now hoped that the visa problem would be resolved. "Turkey does not want any privileges from the EU, but neither do we accept any discriminatory treatment."[22]

And yet, until today the actual impact of this judgement has been deeply disappointing for Turkish travellers. Only few EU member states have changed their visa rules and the way they have done so has not made travel any easier for Turkish service providers.

The reason why not all EU countries are affected by this decision is that the standstill clause does not ban visa requirements per se. It bans "*new* restrictions. If there was already a visa requirement in place when the Additional Protocol became effective, it does not constitute a new restriction.

The Additional Protocol did not enter into force at the same time for today's 28 EU member states. For those nine who were members of the European Economic Community in 1973,[23] the Additional Protocol entered into force on 1 January 1973. For those that joined the EEC or EU later, it entered into force on the day of their accession.

Of the current 28 EU member, 17 had a general visa requirement for Turkish nationals in place when the Additional Protocol became effective for them, be it in 1973 or upon their accession. For them the Soysal judgement changed nothing.

Eleven EU members, including Germany, did not have a general visa requirement in place at the relevant time. However, some of them had specified that while tourists did not need a visa, Turkish citizens coming for work did. To make matters even more complex there were exceptions to that rule too.

Following the 2009 judgement Germany reinstated the rules that were in force in 1973. Then Turkish visitors could enter Germany without a visa *unless they came for work*. However, certain service providers were exempt from the visa requirement even when they came for works: these included Turkish citizens providing transport services or coming to maintain or repair machinery, as well as Turkish artists, scientists and professional sportspeople who came for a performance or event to Germany.

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19 European Court of Justice, Judgment in the case Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland (Reference for a preliminary ruling from the Oberverwaltungsgericht Berlin-Brandenburg), Case C-228/06, 19 February 2009, paragraph 63.

20 Sabah on 20 February 2009.

21 Vatan on 20 February 2009.

22 The Journal of Turkish Weekly and Anadolu Agency, "Turkish Minister Bagis: Turkey does not want any privileges from the EU", 20 February 2009.

23 France, Germany, Italy, Belgium, Luxembourg, Netherlands, Denmark, Ireland and UK.

Today these categories of service providers again do not need a visa for Germany. However, they need to prove that they belong to these categories. This is complicated.[24] In fact, collecting all the evidence Germany demands in order to prove that one falls into the category of a *service provider requiring no visa* is as cumbersome as applying for a visa. Germany even recommends to applicants to obtain "on a voluntary basis" a "cost-free" confirmation from its consular services certifying that they do not need a visa "in order to avoid potentially time-consuming examinations at the border.[25] This explains also the very low number of "Soysal confirmations." According to the German Embassy in Ankara, the consular department issued 4,021 such confirmations in 2010. In 2011 it was only 1,357.[26]

The second country that changed its rules for Turkish service providers was Denmark. Again it can be tricky for a Turkish service provider to establish whether he or she falls in the category of service providers that are exempt from the visa requirement. If the service provider needed *a work permit* in 1973, then he also needed a visa then - and today. However, Danish legislation on who needs and who does not need a work permit is complex.[27] A Turkish traveller has to show documents at the border, in Danish or English.[28] However, neither the Danish Embassy in Ankara nor the Danish border police have information about how many Turkish citizens have used the provisions for Turkish service providers to actually enter the country without a visa.[29] A Danish official told ESI that it is possible, indeed likely, that so far *no* Turkish citizen has actually made use of their right as service providers to enter Denmark without a visa. Nor is it clear if airlines would actually be prepared to let such a person board a plane for Copenhagen.

Other countries have done even less. In fact, today it is still not clear exactly which member states are obliged to change their visa rules in line with the Soysal ruling.

A few months before the ruling, the European Commission asked all EU member states to provide information about their visa policies concerning Turkish service providers when the

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24 Turkish citizens providing transport services or going to Germany to service machinery have to show the following documents at the border: an attestation of their Turkish employer, in German or translated into German; an attestation or order from the German recipient of the service; and evidence of payments to the Turkish social insurance organisation. Artists, scientists and sportspeople have to have an invitation of the organiser that includes a description of their planned activity and the amount of their fee. They also have to be able to prove that they are artists, scientists or sportspeople by showing diplomas, employment contracts or evidence of membership of professional associations.[24] Website of the German Embassy in Ankara, Merkblatt über die Möglichkeit einer visumsfreien Einreise türkischer Staatsangehöriger zur Erbringung einer Dienstleistung in Deutschland.

25 Website of the German Embassy in Ankara, Merkblatt über die Möglichkeit einer visumsfreien Einreise türkischer Staatsangehöriger zur Erbringung einer Dienstleistung in Deutschland.

26 Information provided to ESI by email by the German Foreign Ministry, Office of the Special Envoy for South-Eastern Europe, Turkey and the EFTA States, referring to statistics provided by the German Embassy in Ankara, 21 June 2012.

27 See the Danish Aliens Order, chapter 5, Work Permits.

28 The Danish border guard ask for documents demonstrating "the legal existence and trade relations of the company in Turkey (i.e. a copy of a registration certificate); and (unless the applicant is self-employed) documentation that the person in question is employed by the legally established company in Turkey (i.e. a copy of a contract or ID-card from the company); as well as documentation that the person in question is to provide a service for a company in Denmark (i.e. a copy of the confirmation of the commission).Website of the Danish Immigration Service, Visa exemption for Turkish citizens who are to perform a service in Denmark.

29 Information provided to ESI by email by Hulya Yarar, Head of the Consular Department of the Danish Embassy in Ankara, 28 September 2012.

Additional Protocol became effective for them.[30] The Commission simply accepted the information that it obtained without any thorough independent investigation. The former European Commissioner for Justice, Liberty and Security Jacques Barrot told the European Parliament in September 2009:

> "… it appears that the exemption from the visa requirement only benefits, under certain circumstances, Turkish nationals travelling to some Schengen countries (i.e. Germany and Denmark), as well as to the United Kingdom and Ireland, in order to provide services there."[31]

He was wrong, however. The government of the Netherlands had told the Commission that when the Netherlands and Turkey agreed on a visa-free travel regime in 1953, persons travelling with the aim to carry out a profession or a gainful activity, including service providers, were exempt from it and still needed a visa. Then, in March 2012, the highest administrative court in the Netherlands, the Raad van State, found that this exemption was in fact never transposed into Dutch legislation and thus not applied at the relevant date of 1 January 1973.[32]

As a result the Netherlands also had to change their rules for Turkish service provider. Like Germany, the authorities recommend that Turkish service providers request a "service provider's declaration" from a Dutch consulate before the trip. "While travelers are not required to present such a declaration at the Dutch border, the document may make their dealings with the airline and Dutch border officials much easier," the Dutch Embassy in Ankara explains.[33] The list of documents to be submitted is similar to the German one.[34]

Whilst the Commission failed to investigate seriously which other EU member states should change their visa rules to comply with the Soysal ruling, this was attempted by Kees Groenendijk and Elspeth Guild, two professors at Radboud University in Nijmegen in the Netherlands. They examined 11 EU member states[35] and found that Belgium, France, and Italy may be affected too. They concluded in 2011 that:

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30 Summary of discussions in the Council Visa Working Group in Brussels where all EU member states are represented, on 1-2 October 2008, Council document 14908/08 of 29 October 2008. See also Kees Groenendijk & Elspeth Guild, Visa Policy of Member States and the EU Towards Turkish Nationals After Soysal, Revised and Updated Second Edition, Economic Development Foundation Publication No. 249, Istanbul September 2011, pp. 40-45.

31 European Parliament, Parliamentary questions, Answer given by then Commissioner for Justice, Liberty and Security Jacques Barrot on behalf of the Commission, E-3747/2009, 25 September 2009.

32 In 1973, all Turks could enter the Netherlands freely for a stay of up to three months. See ruling by the Raad van State in Case no. 201102803/1/V3, 14 March 2012.

33 Press release of the Netherlands Embassy in Ankara, Press Release Visa Requirements, 27 August 2012. See also w Website of the Netherlands Embassy in Ankara, Informatieblad over de mogelijkheid voor Turkse onderdanen om zonder visum naar Nederland te reizen om daar diensten te verrichten (Information about the possibility for Turkish nationals to travel without a visa to the Netherlands in order to provide services), 8 August 2012.

34 Website of the Netherlands Embassy in Ankara, Informatieblad over de mogelijkheid voor Turkse onderdanen om zonder visum naar Nederland te reizen om daar diensten te verrichten (Information about the possibility for Turkish nationals to travel without a visa to the Netherlands in order to provide services), 8 August 2012.

35 Groenendijk and Guild looked closely at Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Romania and the UK.

> "... the reaction of governments in Belgium, France, Ireland, Italy, the Netherlands and the UK appears to be something like that of ostriches."[36]

These half-hearted efforts on the part of EU member states and the European Commission to respect association law constitute an embarrassment. This has given rise to entirely justified arguments by Turkish officials that the EU preaches the rule of law to Turkey, but is not so eager to fully comply with all court decisions itself.

Are (Turkish) tourists service-providers?

The Soysal judgment confirmed the right of some Turkish service providers to enter certain EU member states without a visa. It also raised a further issue: who qualified as a service provider?

For Rolf Gutmann, the lawyer in both the Soysal and Demirkan cases, this is the central question. Under EU case law – confirmed numerous times by the Court of Justice - the *freedom to provide services* encompasses two sides: an active side (somebody offers a service) and a passive side (somebody else receives this service). The freedom to provide services requires that neither side should face any restrictions while *providing and receiving* services across borders within the EU.

The most famous ECJ ruling, which settled this issue, was the Luisi and Carbone judgement in 1984. Two Italians had been fined for exporting foreign currencies above the legal limits set by Italy. They argued that they needed the money to pay for services in Germany and France (tourism and medical treatment). The ECJ upheld their claim. It concluded:

> "... that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments, and that *tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services*."[37] [emphasis added]

Gutmann argued that this definition of the freedom to provide services also applies to Turkish citizens and EU-Turkey association law. During a lecture in May 2010 at Yeditepe University in Istanbul he explained:

> "Tourism, travel for the purposes of business, education or medical treatment in European law are included in the definition of 'services'. This definition needs to be extended to the law of association with Turkey."[38]

This meant that not only some certain service providers had the right to enter a number of member states without a visa but that:

> "Turkish tourists still have the explicit right to travel to Germany (and also Belgium, the Netherlands, Great Britain, France, Italy, Spain and Portugal) without a visa.

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36 Kees Groenendijk & Elspeth Guild, Visa Policy of Member States and the EU Towards Turkish Nationals After Soysal, Revised and Updated Second Edition, Economic Development Foundation Publication No. 249, Istanbul September 2011, pp. 38-39.

37 European Court of Justice, Judgment, Joined Cases 286/82 and 26/83, Graziana Luisi and Giuseppe Carbone v the Italian Ministry of the Treasury, 31 January 1984, paragraph 16.

38 Rolf Gutmann's inaugural lecture at Yeditepe University, Istanbul May 2010.

> Nevertheless, the European governments deny them this right. So we need a case in Luxemburg!"[39]

In fact, some courts in Germany had already begun to rule in this sense. In August 2009, a court in the town of Cham ordered the immediate release of a Turkish man who had been arrested at the nearby German-Czech border for illegal residence. He had entered Germany without a visa to buy a car. The court noted:

> "As a Turkish national and *a passive recipient of services*, the concerned party can rely on visa-free travel according to the so-called standstill clause. As he irrefutably declared that the sole purpose of his entering Germany was to purchase a motor vehicle, the court considers that he did not need a visa, so that there was no case of illegal residence."[40]

In 2009, a Turkish businesswoman travelling from Los Angeles to Istanbul via Munich missed her connecting flight in Munich. She was rebooked on another flight the next morning and wanted to spend the night in a hotel. However, German police prevented her from leaving the airport. Later she pressed charges. A court in Munich ruled in February 2011 that she was:

> "... permitted to enter the Federal Republic of Germany for a period of up to three months to receive services, especially for tourism purposes, without a residence permit and without a visa."[41]

Another German court, in Erding not far from Munich, dealt with the case of a Turkish businessman who had been fined 300 Euro for overstaying his visa by eight days. It stated that it would be bizarre to apply different definitions of the freedom to provide services depending on whether the concept was mentioned in the EU Treaty or in the standstill clause.

> "Neither the ECJ's [Soysal] ruling, nor the Additional Protocol envisages a distinction in an active and a passive freedom to provide of services. It would seem out of touch with reality not to apply the Soysal ruling to Turkish businessmen and tourists who receive services on the grounds that this constitutes just a passive service that the Additional Protocol was not supposed to cover."[42]

These were still only individual cases in lower courts. Gutmann wanted the ECJ to rule on the issue, following the same legal logic and applying it across the EU. Leyla Demirkan provided him with the case he needed.

The definition of the freedom to provide services became the main question that the Higher Administrative Court of Berlin-Brandenburg referred to the Court of Justice in May 2011 concerning Demirkan's case:

> "Does the passive freedom to provide services also fall within the scope of the concept of freedom to provide services within the meaning of Article 41(1) of the Additional

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39 Rolf Gutmann's inaugural lecture at Yeditepe University, Istanbul May 2010.

40 Migazin, "Visumsfreiheit für Türken: Kein unerlaubter Aufenthalt", 13 August 2009.

41 Verwaltungsgericht München, Urteil der 23. Kammer vom 9. Februar 2011, Az. M 23 K 10.1983, in: Migazin, "Migration in Deutschland, Visumfreiheit für Türken, Visa-Urteil des Verwaltungsgerichts München," 9 February 2011.

42 Amtsgericht Erding, Case 5 Cs 35 Js 28732/08, Full text of the ruling, 29 April 2009.

> Protocol to the Agreement establishing an Association between the European Economic Community and Turkey of 23 November 1970 (Additional Protocol)?"[43]

Leyla Demirkan had not explicitly stated that she wanted to go to Germany to receive services. She had declared that she wanted to visit her stepfather. Thus the German court also put a second question to the ECJ:

> "… does the protection of the passive freedom to provide services under the law on the Association Agreement, specifically pursuant to Article 41(1) of the Additional Protocol, also extend to Turkish nationals, who — like the claimant — do not wish to enter the Federal Republic of Germany in order to receive a specific service, but for the purposes of visiting relatives for a stay of up to three months and rely on the mere possibility of receiving services in the Federal territory?"[44]

The ECJ not only accepted the case, but it decided it case would go to a Grand Chamber with 15 judges. This is done for very important decisions. (Exceptionally, the court also calls all its judges – one per member state. Last year this was done only one time: when the court had to decide whether the newly created European Stability Mechanism, the Euro zone's permanent bail-out fund, was in line with the EU Treaty.[45])

The court also assigned one of its eight advocates-general to the Demirkan case to present an independent opinion. Advocates-generals are assigned to cases where new points of law are raised. They have the same qualifications as the court's judges. Their opinion is advisory character and non-binding, but in the past the court has often followed advocate's-general opinions.[46]

During 2011 eight EU member states (Germany, the Czech Republic, Denmark, Estonia, France, the Netherlands, Slovakia and the UK) as well as the European Commission and the Council all submitted written observations to the Court of Justice. They were united in suggesting that the court answer both questions with 'No'. The hearing for the case was scheduled for 6 November 2012.

Rolf Gutmann argued, both in his written submission and in court, that the parties negotiating the Additional Protocol, the EEC and Turkey, were clearly aware even then that the freedom to provide services had an active and a passive side. As evidence he cited an EU directive adopted in 1964. This directive mentioned as intended beneficiaries "nationals of Member States wishing to go to another Member State as recipients of services."[47] This was years before the EEC and Turkey concluded the Additional Protocol in 1970.

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43 Reference for a preliminary ruling from the Oberverwaltungsgericht Berlin-Brandenburg (Germany) lodged on 11 May 2011 — Leyla Ecem Demirkan v Federal Republic of Germany, (Case C-221/11), in: Official Journal of the European Union, C 232/15, 6 August 2011.

44 Reference for a preliminary ruling from the Oberverwaltungsgericht Berlin-Brandenburg (Germany) lodged on 11 May 2011 — Leyla Ecem Demirkan v Federal Republic of Germany, (Case C-221/11), in: Official Journal of the European Union, C 232/15, 6 August 2011.

45 Judgment of the Court (Full Court) of 27 November 2012, Thomas Pringle v Government of Ireland, Ireland and The Attorney General, Case C-370/12.

46 See website of the Court of Justice, Presentation, and Rules of Procedure 2012, as well as P. Mathijsen, A Guide to European Union Law as amended by the Treaty of Lisbon, 2010, pp. 125-172.

47 Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Art. 1(1).

Gutmann also pointed out that the Ankara Agreement stipulated how the "freedom to provide services" in the Ankara Protocol was to be interpreted. Interpretation was to be "guided by" the relevant passages in the EEC treaty:

> "The Contracting Parties agree *to be guided by* Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them."[48]

These articles - today Articles 51, 52 and 56 to 61 of the Treaty on the Functioning of the EU[49] - deal with the right of establishment and services. They provide definitions, stipulate rights and specify limitations. They have been further interpreted by the ECJ.

For Gutmann the formulation "to be guided" implied that the concept "freedom to provide services" was to be understood in the same ways in the Association Agreement with Turkey. Gutmann underlined that the ultimate objective of the Association Agreement was to prepare Turkey for EU membership, so that it had ultimately the same objectives as the EU Treaties. Therefore EU case law applied. He also noted that the EU-Turkey customs union of 1995 – which guarantees freedom of movement of goods – had to be accompanied by freedom of movement for the people producing and selling these goods in order not to impede this freedom and discriminate against Turkish businesses.

Gutmann was ploughing a lone furrow. No other party agreed with him. Instead the European Commission, the Council and member states put forward a barrage of arguments that the freedom to provide services meant something different in EU-Turkey association law than in the EU's own internal law. The French representative put as follows:

> "According to settled case law, a mere similarity in the wording of a provision of the EU Treaty and of an international agreement between the Union and a third country does not suffice to give the provision in the international agreement the same meaning as it has in the EU Treaties … It is therefore of considerable significance to compare the purpose and context of the agreement and of the EU Treaty."

Member states argued that the 1963 Association Agreement and the EU Treaty pursued different goals. They cited cases where the ECJ had previously found that association agreements and the EU Treaty have different objectives, and that therefore the same terms could be interpreted differently. Some referred to cases concerning association agreements with Poland, the Czech Republic and Bulgaria. Others pointed to the 2002 Agreement with the Swiss Federation. They mentioned a 2003 ECJ ruling that had found that EU Treaty provisions "must be extended, *so far as possible*, to Turkish nationals" covered by EU-Turkey association law – but they emphasised that "so far as possible" did not mean "fully".[50] Member states also referred to the December 2011 *Ziebell* ruling where the ECJ had found that the Association Agreement with Turkey pursued "a solely economic purpose".[51]

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48 Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963, entry into force on 1 December 1964, Art. 14.

49 Treaty on the Functioning of the European Union, consolidated version, Art. 77, paragraph 1(a).

50 European Court of Justice, Judgement of 21 October 2003 in the Joined Cases C-317/01 and C-369/01, Abatay and Others, paragraph 112.

51 Court of Justice of the EU, Judgment of 8 December 2011 in the Case C-371/08 Nural Ziebell vs Land Baden-Württemberg, paragraph 74, at http://curia.europa.eu/juris/celex.jsf?celex=62008CJ0371&lang1=en&type=NOT&ancre=.

EU member states stressed that until the 1984 Luisi and Carbone ruling of the ECJ the exact meaning of the freedom to provide services had not been established. They underlined that one of the stated aims of the Association Agreement was "to ensure an accelerated development of the Turkish economy." "In particular with regard to tourists, it is hardly evident how the promotion of trips of Turkish tourists to member states can help the economic development of Turkey," the French representative stated.

A broad interpretation of the standstill clause would be in conflict with the EU Treaty, which envisages a common visa policy.[52] The Council representative warned:

> "A situation in which potentially all Turkish nationals would not need a visa for 9 Schengen countries ... while they would need a visa for 14 EU member states and another 4 Schengen states, would not only be in violation of Council Regulation 539/2001, but also in violation of the objective of a common visa policy that is anchored in EU primary law."

The German representative warned about huge migration pressure from Turkey: "It is the opinion of the Federal Government that the abolition of the visa requirement for Turkish nationals would be against the public interest of the Federal Republic of Germany in effective migration control." A positive ruling would lead in practice "to the collapse of the common European visa system."

Slovakia pointed to the administrative burden if those countries that would be allowed to keep the visa requirement – like Slovakia – would have to issue (transit) visas for visits of EU member states that would no longer be able to demand visas.

Some EU members even argued that the visa requirement for Turkish nationals was in fact not a "restriction". The German representative mentioned that the German government had eased the requirements for a visa. Visa applicants now do not have to appear in person and the visa free is often reduced or waived. The UK representative argued that the visa requirement actually had advantages for Turkish travellers since it "gives them the security that they meet the conditions for entry and stay and that they will not be refused entry upon arrival at the border."

The advocate-general and reasons for pessimism

On 11 April 2013, a major development occurred when Advocate-General Pedro Cruz Villalon from Spain presented his arguments to the court in a 20-page opinion. He stressed that he did not agree with some of the arguments made by member states in court:

> "Visa applicants are subject to costs and an administrative burden which a person seeking to enter another country not subject to a visa requirement does not have to endure … Moreover, a visa does not ensure legal certainty as the mere possession of a visa does not automatically entail a right of entry."[53]

However, on the key issues he agreed with the member states. Above all he noted that:

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52 Treaty on the Functioning of the European Union, consolidated version, Art. 77, paragraph 1(a).

53 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 40.

> "... it cannot be determined with absolute certainty what the Contracting Parties understood under the concept of 'freedom to provide services' at the time the Additional Protocol was concluded. Admittedly, it appears clear that they made use of the terminology of the EEC Treaty on the freedom to provide services. However, at the relevant time, the substance of that notion was unclear ... until 1984 with the Court's judgment in Luisi and Carbone. Prior to that case, indicia existed which were favourable and, equally, others which were unfavourable to the inclusion of the passive freedom to provide services."[54]

There were some "favourable indicia" even before the Luisi and Carbone decision in 1984 that settled the issue. He noted the 1964 directive that mentioned the passive freedom to provide services, which Rolf Gutmann had referred to. However, there was no "absolute certainty":

> "As late as 1976, in his Opinion in *Watson and Belmann*, Advocate General Trabucci expressly rejected such a wide interpretation. He regarded a broad interpretation of that kind as contrary to the wording of Article 59 of the EEC Treaty and inconsistent with the structure of the Treaty which distinguished between the freedom of movement accorded to different categories of market participants."[55]

On the issue of the meaning of the phrase "to be guided" by EU Treaty provisions in interpreting the Association Agreement with Turkey he wrote:

> "The phrase 'be guided by' demonstrates that the freedom to provide services established in primary law is intended to serve as a model. However, it makes it equally clear that the freedom to provide services is not to be extended in its entirety to the Association relationship. The expression 'be guided by' does not imply uniformity and, instead, permits, in principle, different interpretations."[56]

He also noted:

> "According to that case-law, the similarity or even uniformity between the wording of provisions of an agreement with a non-member country and the corresponding provisions of the Union Treaties does not in itself suffice to extend the case-law on the provisions of the Union Treaties to the agreement with the non-member country."[57]

He referred to article 31 of the UN's 1969 Vienna Convention on the Law on Treaties states:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[58]

And this, he argued, meant that "entirely in accordance with Article 31 of the Vienna Convention on the Law of Treaties, the possibility of extension is dependent on the objectives of the relevant agreements." [59]

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54 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 55.

55 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 57.

56 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 60.

57 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 62.

58 Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entry into force on 27 January 1980, Art. 31(1).

The advocate-general agreed with the finding in the Ziebell case that the Association Agreement "is intended to promote trade and economic relations between Turkey and the European Union and has an exclusively economic purpose".[60] The purpose of EU Treaties, on the other hand, is "to create an internal market, that is, to merge the national markets into a single market, the establishment of which involves the abolition of obstacles to the free movement of goods, persons, services and capital between Member States."[61] The extension of the freedom to provide services to service *recipients* constituted "an initial step towards the establishment of free movement for Union citizens."[62]

He concluded:

> "Thus, having regard to the aims of the agreements, the Court's case-law on the passive freedom to provide services in the framework of Article 56 [of the Treaty on the Functioning of the EU] cannot be extended to Article 41(1) of the Additional Protocol....Consequently, the answer to the first question must be that the concept of freedom to provide services in Article 41(1) of the Additional Protocol does not include the passive freedom to provide services."[63]

Not surprisingly, the then also recommended a negative answer to the second question of the Berlin court, whether a Turkish national would qualify as a service recipient if he or she came to Germany to visit relatives: "... where there are no services at issue or the services are purely of marginal significance, free movement for service recipients does not come into play."[64]

Will the ECJ defy expectations?

So what can one expect from the court decision this week?

The opinion of advocate-generals is always influential. In the past the ECJ has often followed the opinions of its advocates-general, although no comprehensive study exists of how often. As one observer of the court concluded recently:

> "Every time we, or anyone else, report on opinions published by an Advocate General of the European Court of Justice we trot out the fact that these advisory opinions are followed in about 80% of cases. I say 'fact', but on closer inspection it seems that the status of the 80% figure is rather more lowly than 'fact'. It turns out that it languishes somewhere between rumour and conjecture … we have been sloppy. We have been using – for a long time – a figure that we took as received wisdom and never actually checked. We won't be using it again."

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59 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 62.

60 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 65.

61 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 67.

62 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 69.

63 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraphs 70 and 72.

64 Opinion of Advocate-General Cruz Villalón, Case C-221/11, Leyla Ecem Demirkan v Germany, delivered on 11 April 2013, paragraph 77.

And yet the same observer noted that "Our ECJ moles tell us that it is certainly the case that the AG and ECJ agree in a majority of cases, so 'a majority' it is."[65]

At the same time the ECJ is also known for defying expectations, as it did in 2009 in the Soysal case. As Hugo Brady, a senior researcher with the London-based think-tank *Centre for European Reform* and close observer of the ECJ told ESI recently:

> "The court is inscrutable. EU judges probably consider that a veneer of inscrutability is part of the job, much like the members of the European Central Bank's governing council in Frankfurt."

ESI hopes that the ECJ will follow the arguments made by Leyla Demirkan and her lawyer. This would constitute a major breakthrough towards the ultimate goal outlined in the Association Agreement of ever closer integration. It would make up for a commitment not yet fulfilled by the Council of Association:

> "The Council of Association shall ... determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services."[66]

It would be a very good way to mark the 50th anniversary of the Association Agreement.

At the same time it is worth noting that even if the court decides in Leyla Demirkan's favour this would not by itself mean that the EU would abolish the visa requirement for the entire Schengen zone. Even a positive decision in the Demirkan case would only apply to 11 EU member states: those that introduced a general visa requirement for Turkish citizens *after* the Additional Protocol entered into force for them. Turkish tourists could then travel to Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands, UK, Portugal and Spain without a visa.

This would still leave 17 EU member states requiring a visa from Turkish citizens. For those who plan to go to one of the 11 countries without a visa requirement by airplane this would not matter. However, those that want to reach one of these 11 countries by car, train or ship would need a visa to transit the remaining EU countries on the route. The Demirkan judgement, even if positive, would change nothing for Greece, Bulgaria, Romania, Hungary and Austria. Following the Soysal ruling the Commission specified in its update of the "Practical Handbook for Border Guards" that:

> "... when a Turkish national wishes to enter the territory of one of these three Member States *[i.e. Germany, Denmark, Netherlands*] via the territory of one or more other Member States, he/she still needs a visa to transit through the territories of these other Member States."[67]

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65 Out-Law.com, Legal news and guidance from Pinsent Masons (an international law firm), How often does the ECJ follow Advocates General? Or should that be CJEU?

66 Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force, signed in Brussels on 23 November 1970, entry into force on 1 January 1973.

67 Commission Recommendation of 14.12.2012 amending the Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons (C (2006) 5186 final)

> "As he/she does not need a visa for entering into the Member State that constitutes his/her main destination, but for passing through other Member States, the Turkish national shall apply for a short-stay visa from the consular authorities of the Member State of his/her first entry in the Schengen area." [68]

This means that even in if the ECJ agrees with Leyla Demirkan the Turkish government would have to enter into negotiations with the EU and start a visa liberalisation dialogue as soon as possible. Launching a visa liberalisation dialogue as soon as possible would of course be even more crucial for Turkey in case the court follows the opinion of its advocate-general and does not lift the visa requirement for Turkish tourists going to any Schengen country.

EU member states and the European Commission should also finally address the issue of compliance with the Soysal ruling seriously. Germany, the Netherlands and Denmark should simplify procedures and inform all border guards *and airlines* about what Turkish service providers have to show. The remaining eight member states that are potentially affected should examine in good faith which visa rules for Turkish service providers were in force when the Additional Protocol entered into force and restore them.

[68] Commission Recommendation of 14.12.2012 amending the Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons (C (2006) 5186 final)

About ESI's Schengen White List Project

ESI White List Project team and Stiftung Mercator meeting President Abdullah Gul

ESI has been working on the issue of visa liberalisation since 2006.

We would like to express our gratitude to our advisory board, in particular Chairman **Giuliano Amato** and Board Members **Otto Schily** and **Charles Clark** for providing guidance in this endeavour. We are also grateful to all donors that have enabled us to do this analysis. Since 2012, we have focused on Turkey, seeking to contribute to the launch of a process between Turkey and the EU. Our main donor for this work has been the **Stiftung Mercator**.

ERSTE Stiftung and OSI's **Think-Tank Fund** have helped us deal with wider issues related to visa liberalisation in the Balkans and other countries trying to obtain visa-free travel with the EU. In 2009/2010 we ran a project aimed at ensuring a fair visa liberalisation process for five Western Balkan countries. This was supported by the **Robert Bosch Stiftung**. Visit our website "Europe's Border Revolution and the Schengen White List Project" at www.esiweb.org/whitelistproject.

Relevant ESI publications:

ESI paper: Happy Anniversary? EU-Turkey relations at age 50 – An appeal (12 September 2013)

ESI report: Cutting the Visa Knot – How Turks can travel freely to Europe (21 May 2013)

ESI interview: Today's Zaman, "Knaus: Turkey, EU to develop more trust through plans for visa-free regime" (27 January 2013)

ESI report: Saving visa-free travel – Visa, Asylum and the EU roadmap policy (1 January 2013)

ESI analysis: Moving the goalposts? An analysis of the Kosovo visa roadmap (6 July 2012)

ESI discussion paper: Nine reasons for a visa liberalisation process with Turkey (20 June 2012)

ESI backgrounder: Facts and figures related to visa-free travel for Turkey (15 June 2012)

ESI news: ESI meeting President Gul and EU ambassadors in Ankara to discuss visa free travel for Turks (22 March 2012)

ESI commentary: "Being fair to Turkey is in the EU's interest" (12 March 2012)

Rumeli Observer: Land borders in Europe. A dramatic story in three acts (12 October 2011)

Rumeli Observer: Amexica and other reflections on border wars (12 December 2010)

ESI Report: A very special relationship. Why Turkey's EU accession process will continue (11 November 2010)

ESI/Populari report: "Bosnian Visa Breakthrough" (16 October 2009)

ESI Scorecard: Which Balkan countries deserve visa-free travel (22 May 2009)

Glossary: Understanding Europe's borders (A to Z)

There have also been more than 400 articles in international media referring to the ESI White List Project and our work on visa liberalisation.