

VISA-FREE TRAVEL FOR TURKEY: IN EVERYBODY'S INTEREST

Today Turkey is the only EU candidate country whose citizens are obliged to obtain a Schengen visa before being allowed to enter the EU. This is a source of intense frustration for Turkish citizens and officials alike. So far the EU has refused to offer Turkey a visa liberalization process like the one that it conducted with Western Balkan countries a few years ago, and which it is now conducting with Moldova and Ukraine. This process requires a country to carry out reforms that help protect the EU's external borders; in return, the visa requirement is lifted. The EU's refusal runs counter to its own security interests. The Turkish-Greek border is the main gateway to the EU for irregular migrants. The EU needs Turkey's full cooperation in order to reduce illegal migration to the EU – but it needs to offer something in return. A visa liberalization process would also be smart in view of a growing number of court decisions that have declared the visa requirement for Turkish nationals illegal in certain cases. Such a process would radically improve EU-Turkey relations and inject new momentum into the flagging accession process.

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hen the EU lifted the Schengen short-stay visa requirement for Macedonia, Montenegro and Serbia in December 2009, Turkey's Foreign Minister Ahmet Davutoğlu could not hide his dismay that Turkey had not been offered any prospect of visa-free travel. "It is unacceptable," he said, "that certain Balkan countries that are in the initial stages of the membership process and have not begun negotiations, have been given the Schengen privilege, while Turkey –considering the level that Turkey-EU relations have reached– has not."¹

Today, two-and-a-half years later, Turkey's situation remains the same. Turkey is the only EU candidate country whose citizens are obligated to apply for a visa before being allowed to enter the EU. The EU has given Turkey little reason to expect that a formal visa liberalization process –like the one that the EU conducted with Western Balkan countries, and which it is now conducting with Moldova and Ukraine– may be within reach. In 2010, when Turkey itself tried to jumpstart such a process, it was unceremoniously rebuffed by EU member states.

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Now there might be a chance for a new beginning. To take advantage of it, both sides will have to compromise and act strategically, looking beyond recent altercations. The benefits that would accrue from cooperation in the field of visa and migration policy, they should both realise, are significant. A visa liberalization process would radically improve EU-Turkey relations, injecting new momentum into the

flagging accession process. It would help Bulgaria and Romania join the Schengen zone – and make sure that Greece is not kicked out of it. Moreover, it would also save some EU member states from the embarrassment of being forced to lift the visa requirement for Turkish nationals by the EU's own courts.

Visa Liberalization à la EU

The premise behind a visa liberalization process is that a third country is expected to carry out a number of reforms that help protect the EU's external borders. In return the country receives visa-free travel, i.e. the possibility for its citizens to enter the Schengen zone for up to 90 days over a 180-day period. A short-stay tourist visa is stamped into one's passport when he or she crosses the border.

¹ Andreas Illmer, "Angered Turkey demands visa-free travel to EU's Schengen area", *Deutsche Welle*, 20 December 2009, <http://www.dw.de/dw/article/0,,5040858,00.html>

Five Western Balkan states were the first to be on the receiving end of this policy. In early 2008, the European Commission launched “visa dialogues” with the five. “Visa liberalization roadmaps” followed within a few months later. The roadmaps, which were almost the same for all five countries, listed close to 50 conditions that needed to be met to qualify for visa-free travel. These included enhanced border control, prevention of illegal migration, a functioning readmission agreement with the EU, the introduction of biometric passports and secure methods to manage civil registries, a more effective fight against organised crime and corruption, anti-discrimination and minority policies, and close cooperation with EU member states and EU agencies such as Frontex, Europol and Eurojust.

The Balkan states worked hard to meet the requirements, providing the Commission with regular progress reports. Between January and March 2009, the Commission organised the first set of on-site missions comprising its own experts as well as experts from EU member states to check how far the Balkan countries had come in reaching the benchmarks. More assessment missions followed. In the end, all five countries met the conditions. The visa requirement was lifted for Macedonia, Montenegro and Serbia on 19 December 2009, and for Albania and Bosnia on 15 December 2010.

The Issue of the EU-Turkey Readmission Agreement

When Turkey inquired in 2009 about its own prospects for a visa liberalization process, the Commission and EU countries underlined that for this to happen, Ankara and the EU would first have to sign and implement a readmission agreement. This, they pointed out, was a non-negotiable precondition. The Western Balkan countries, they said, had had to put into effect such agreements before the visa liberalization process could be launched.

The readmission agreement was a sensitive issue. Under it, Turkey would commit itself to taking back not only all Turkish nationals found in the EU without authorization, but also third-country nationals found to have transited to the EU through Turkey.

Already, Turkish nationals can be, and are, sent back by EU member states under international law. The real problem is that Turkey is a transit country for migrants from Asia and parts of Africa. In 2010, according to Frontex, close to 80 percent of detected illegal crossings into the EU, more than 50000 cases, took place by the Turkish-Greek border.² In recent years, most of these irregular migrants have been Afghans, Pakistanis, Bangladeshis, Algerians and Moroccans.³

² According to Frontex, EU member states detected 104049 illegal crossings into the EU in 2010. If one disregards circular migration from Albania to Greece (33704), there were still 70345 detected illegal crossings. Of those, 53881 (76.6 %) were detected at the Greek-Turkish land border and at the Greek sea borders. See “Press Pack May 2011”, Frontex, http://www.frontex.europa.eu/assets/Media_centre/Frontex_Press_Pack.pdf

³ “Annual Risk Analysis 2012”, Frontex, April 2012, http://www.frontex.europa.eu/assets/Attachment_Featured/Annual_Risk_Analysis_2012.pdf

The EU has assumed that a readmission agreement would eventually force Turkey to take measures to reduce the flow of migrants into and out of Turkey – since most would be sent back. Since 2002, the EU has thus tried to negotiate such an agreement with Turkey. For a long time Turkey was not interested, arguing that taking back tens of thousands of third-country nationals would be very costly. Negotiations only started in 2005. They were suspended one year later. The prospect of a visa liberalization process changed the equation. At the end of 2009, Turkey signalled its willingness to resume negotiations on a readmission agreement. The resulting talks were successfully concluded after a few rounds, with the last one taking place in January 2011.

In return for wrapping up talks on the agreement, Turkey expected the EU's interior ministers, who were coming together for a meeting of the Justice and Home Affairs Council on 24 and 25 February 2011, to give a green light to the launch of a visa liberalization dialogue.

EU interior ministers stopped well short, however, approving a non-committal “dialogue on visa, mobility and migration” and offering “practical improvements for Turkish visa applicants within the framework of the EU Visa Code.”⁴ It was the diplomatic equivalent of a slap in the face.

Foreign Minister Davutoğlu was furious, tweeting:

Turkey is not a second class country. We want equal treatment like every civilized nation. [...] Until the Council gives the Commission a mandate of visa exemption for Turkey, we will not sign or implement the readmission agreement. [...] Our stance is clear: a commitment for a commitment, a verbal agreement for a verbal agreement, a written decision for a written decision, implementation for implementation.⁵

Turkish officials later elaborated that Turkey would make each future step in the procedure leading to the implementation of the readmission agreement (initialization, signing, ratification, implementation) contingent on progress towards visa liberalization. To date, the readmission agreement remains non-initialled, with Turkey rejecting the proposed dialogue on visa, mobility and migration as a play for time.

What EU interior ministers have not sufficiently addressed until now is the actual, as opposed to symbolic, impact of the readmission agreement on Turkey. The current negotiated text states that the obligation to take back third-country

⁴ Council of the European Union, “Council conclusions on EU-Turkey Readmission Agreement and related issues”, JHA Council meeting in Brussels, 24-25 February 2011, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/119501.pdf

⁵ Ahmet Davutoğlu, *Twitter*, 25 February 2011, http://twitter.com/#!/ahmet_Davutoglu

nationals would become effective only after a three-year transitional period. In practical terms, this means that for the first three years, Turkey would not have to take back any foreigners but only its own nationals, which it is already doing. This is not unusual: deferrals of the third-country national clause also existed in readmission agreements that the EU concluded with Russia, Ukraine and Albania.

For the first three years after the readmission agreement's entry into force, therefore, very little would actually change for Turkey. Even afterwards, it would be up to Turkey to decide how many third-country nationals it would accept back. After all, Turkey already has a bilateral readmission agreement with Greece, which has made very little difference in the migration dynamic. Since this agreement's entry into force in April 2002, Greece has requested Turkey to readmit 101537 migrants, the vast majority of them third-country nationals. Turkey has accepted the return of 11425 persons (11 percent). In the end, only 3686 (3.6 percent) were returned.⁶

"Without serious political will and strong incentives, a readmission agreement will make little difference."

The real problem is not if and when Turkey will initial or sign or ratify the readmission agreement. Without serious political will and strong incentives, a readmission agreement will make little difference. There are better and more effective ways in which Turkey could help right away, stepping up its efforts to prevent potential irregular migrants from reaching the Turkish-Greek border.

The Reasons for the EU's Reluctance

EU interior ministers cite many reasons why they are opposed to the idea of a visa liberalization process for Turkey. Most have to do with prejudices, the lack of trust and past grievances.

Some interior ministers believe that they stand no chance of convincing their electorates that visa liberalization would be a safe bet. The image of the poor backward Turk who comes to Europe for work remains embedded in the heads of EU citizens. Some interior ministers themselves fear that Turks would abuse visa-free travel to settle permanently in the EU. They also worry that the number of asylum seekers from Turkey (6300 in 2011, of whom fewer than 700 succeeded at first instance⁷) might increase. However, the likelihood of a significant number of Turks going to the EU to work illegally is small. Today, per-capita GDP in Turkey is the second highest in the

⁶ Information provided to ESI by the Permanent Representation of Greece to the EU in Brussels, 4 April 2012.

⁷ In relation to asylum claims by Turkish nationals, EU member states made 5580 decisions at first instance in 2011. 465 persons were granted political asylum and another 85 subsidiary protection, another form of international protection. Eurostat, "First instance decisions on applications by citizenship, age and sex, Annual aggregated data (rounded)", data online code [migr_asydcfst], *Eurostat interactive database*, http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database

entire Balkan region including Bulgaria and Romania – only Greece's is higher. As for potential asylum claims, the visa liberalization process requires human rights problems to be tackled, and anti-discrimination and minority policies to be put in place.

"So far, the EU has offered Turkey no incentives to support its fight against illegal migration."

Some EU interior ministers argue that Turkey is not doing enough to stop migrants from third countries from transiting to the EU. They note that the number of illegal crossings at the Turkish-Greek land border increased again from 47700 in 2010 to around 53500 in 2011.⁸ They also frown upon Turkey's visa-free travel regime with many migrants' countries of origin, such as Morocco, Libya, Iran and Iraq.

Undeniably, Turkey could do more to guard its side of the border. However, Turkish officials argue off the record that they are forced to concentrate limited resources for border protection on the country's long and difficult eastern and southern borders. To shift these resources towards the Greek border, they say, is not an obligation, but would be a big favor to the EU. In the eyes of Turkish officials, EU interior ministers are hoping to outsource their problems to Turkey without affording Turkish citizens the fair treatment they expect in return: the possibility to enter the EU without a visa.

So far, the EU has offered Turkey no incentives to support its fight against illegal migration. EU governments have simply put forward one demand after another, the oldest of these being the readmission agreement. EU ministers have failed to acknowledge the obvious: such an agreement would only be a partial solution, and, without Turkish goodwill, no solution at all.

The EU needs Turkey's full cooperation to tackle the problem of illegal migration at the Europe's Eastern Mediterranean border. It needs Turkey to better control who comes into Turkey from the East and by plane, and who leaves to Greece. It needs Turkey to closely collaborate with Frontex and Europol. And the EU would gain from better management of migrants in Turkey, which includes the establishment of an asylum system for people in need of protection from across the world.

Paradoxically, interior ministers are increasingly aware that they depend on Turkey. All these points are part of a new strategy –approved by the Justice and Home

⁸ "Press Pack May 2011", *Frontex*, http://www.frontex.europa.eu/assets/Media_centre/Frontex_Press_Pack.pdf and "Annual Risk Analysis 2012", April 2012, *Frontex*, http://www.frontex.europa.eu/assets/Attachment_Featured/Annual_Risk_Analysis_2012.pdf

Affairs Council at the end of April 2012– to fight illegal migration. “We urgently need a dialogue with Turkey,” remarked Hans-Peter Friedrich, the interior minister of Germany.⁹ However, apart from some financial and technical assistance, the EU has offered nothing in return.

There is, of course, the issue of visa liberalization, which Turkey is currently keen on. Offering a credible path to this goal is thus central to obtaining the cooperation needed to fight illegal migration to the EU. Turkish officials themselves acknowledge this. If the EU offers Turkey a visa liberalization process, Turkish Minister for EU Affairs Egemen Bağış has said, “We will sign the readmission agreement, which the EU expects from us, and we will start to take the necessary measures to decrease the numbers of immigrants who go to EU Member States through Turkey illegally.”¹⁰ The results of such a policy could be quantified by looking at the numbers of those who reach Greece through Turkey. It would create transparent incentives for both sides.

The Court Cases on Visa-Free Travel for Turkish Nationals

The goal of reducing illegal migration into the EU is not, however, the only reason for the EU to rethink its current visa policies towards Turkey. There is one more compelling argument for the EU to reverse its current policy: it may well be found to be illegal by European courts. In fact, this has already started to happen.

The issue of the legality of visa requirements goes back to the 1963 Association Agreement between the then European Economic Community (EEC) and Turkey and a 1970 “Additional Protocol” to this agreement. The Association Agreement envisaged ever-closer trade and economic relations between the EEC and Turkey, which, among other things, would eventually include freedom of establishment (freedom to carry out an economic activity) and freedom to provide services.¹¹ The 1970 protocol banned the introduction of new restrictions on these two freedoms. Article 41.1, the so-called “standstill clause”, stipulated: “The Contracting Parties shall refrain from introducing between themselves any new restriction on the freedom of establishment and the freedom to provide services.”¹²

Particularly in Germany and the Netherlands, Turkish nationals have gone to court claiming that the short-stay visa requirement constituted a limitation on both of

⁹ “Germany, Austria raise border-check spectre against Greece”, *Monster and Critics*,

http://news.monstersandcritics.com/europe/news/article_1694306.php/Germany-Austria-raise-border-check-spectre-against-Greece

¹⁰ “Egemen Bağış: Vize Kolaylığı Değil, Vize Muafiyeti İstiyoruz” [We want visa exemption, not facilitation], *SonDakika.com*, 8 April 2012, <http://sondakika.com/haber-egemen-bagis-vize-kolayligi-degil-vize-muafiyeti-3519744/>

¹¹ Agreement establishing an Association between the European Economic Community and Turkey, signed on 12 September 1963 (Ankara), entered into force on 1 December 1964, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21964A1229\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21964A1229(01):EN:NOT)

¹² Additional Protocol and Financial Protocol 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 on 23 November 1970 (Brussels), entered into force on 1 January 1973, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21970A1123\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21970A1123(01):EN:NOT)

these freedoms. The courts have agreed. The question they examined is whether the EU country in question required a visa from Turkish service providers and businesspeople prior to the Protocol's entry into force in this country – 1 January 1973 for the nine EEC members at the time, and the date of accession for all other EU countries. If it did not, courts, including the European Court of Justice (ECJ), have found the current visa requirement “a new restriction” and thus illegal.

The most famous ruling, by the ECJ on 19 February 2009, concerned lorry drivers Mehmet Soysal and İbrahim Savatlı, who had covered the Turkey-Germany route for a Turkish company. In 2001 and 2002, Germany repeatedly refused to issue them visas. The two went to court, arguing that they had been providing services in international transport and –in line with the Association Agreement and its Additional Protocol– should have been allowed to enter Germany without visas. The ECJ agreed:

“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 undertaking established in Turkey, since, on that date, such a visa was not required.”¹³

There is more to it than this. According to ECJ rulings and EU legislation, the freedom to provide services also includes the freedom to receive services. Many German courts have already ruled accordingly. In 2009, Candan Erdoğan, a businesswoman travelling from Los Angeles to Istanbul via Munich, missed her connecting flight and was rebooked on another flight the next morning. German police did not allow her to leave the airport to overnight in a hotel. She pressed charges. A court in Munich ruled in February 2011 that she “is 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.”¹⁴

In August 2009, a Turkish national was arrested at the German-Czech border for attempting to enter Germany without a visa in order to buy a car. A court in the town of Cham ordered his immediate release, noting: “The aggrieved party, as a Turkish national and passive recipient of services, can rely on visa-free travel according to the so-called standstill-clause.”¹⁵ In August 2008, a Turkish businessman

¹³ European Court of Justice, *Mehmet Soysal and İbrahim Savatlı v Bundesrepublik Deutschland* (Reference for a preliminary ruling from the Oberverwaltungsgericht Berlin-Brandenburg), Case C-228/06, 19 February 2009, paragraph 63, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CJ0228:EN:HTML>

¹⁴ Administrative Court Munich, Sentence of the 23rd Chamber on 9 February 2011, Az. M 23 K 10.1983, paragraph 1, in: “Migration in Deutschland, Visumfreiheit für Türken, Visa-Urteil des Verwaltungsgerichts München” [Migration in Germany, Visa Exemption for Turks, Administrative Court of Munich's Decisions about Visa], *Migazin*, 9 February 2011, http://www.migazin.de/2011/04/11/visa-urteil-visum-urteil-turken-turkisch-vg-munchen/#identifier_0_30393

¹⁵ “Visumsfreiheit für Türken: kein unerlaubter Aufenthalt” [Visa exemption for Turks: no illegitimate stay], *Migazin*, 13 August 2009, <http://www.migazin.de/2009/08/13/visumsfreiheit-fur-turken-kein-unerlaubter-aufenthalt/>

had to pay a 300 euros fine at the Munich airport because he had overstayed his visa by eight days. In April 2009, a court in Erding acquitted him, arguing that Turkish businessmen and tourists are allowed to enter and stay in Germany for two months (business people) or three months (tourists), in accordance with German visa rules in 1973.

“The EU’s response to the court rulings has so far been disappointing.”

A court in Berlin has now asked the ECJ to clarify once and for all if the passive freedom to provide services falls “within the scope of the concept of freedom to provide services within the meaning of Article 41(1) of the Additional Protocol.” This concerns the case of Leyla Ecem Demirkan, a Turkish teenager whose mother married a German national and moved to Germany. In 2007, when Leyla wanted to visit Germany –her stepfather had fallen ill and had been hospitalised in Stuttgart– her request for a visa was rejected.

If the ECJ answers positively, it will mean that the Schengen visa requirement for Turkish nationals who receive services (read: all Turkish nationals) is illegal in 11 EU member states, all of which did not have a short-stay visa requirement for Turkish nationals when the Protocol entered into force.¹⁶ The ruling is expected around the end of 2012 or in early 2013.

The EU’s response to the court rulings has so far been disappointing. In a set of guidelines issued to EU member states after the Soysal ruling, the European Commission disregarded the possibility that freedom to provide services might also include the freedom to receive services. It argued that:

Out of the 11 [...] Member States that did in principle exempt Turkish citizens from the visa obligation at the relevant dates, seven of them did require a visa from Turkish citizens that came to their territory in order to carry out a paid activity or pursue a professional activity there. Therefore, 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.¹⁷

Of the four countries cited, only Denmark has actually changed its rules in line with the Soysal ruling. Having issued detailed explanations how this can be established

¹⁶ The Berlin court has also asked the ECJ whether a Turkish national has to go to Germany with the intention to receive a specific service or whether the passive freedom to provide services also encompasses “the mere possibility of receiving services in the Federal territory.” If the ECJ answers this question positively, Turkish visitors would not even have to cite a specific service they want to receive.

¹⁷ Parliamentary questions, Answer given by then Commissioner for Justice, Liberty and Security Jacques Barrot on behalf of the Commission, E-3747/2009, *European Parliament*, 25 September 2009, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-3747&language=EN>

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and which documents are required to prove it, Danish authorities now decide at the border whether or not a Turkish citizen can be designated as service provider.¹⁸ Germany too has clarified which categories of people it considers to be service providers. However, applicants have to go to a consulate before their trip and prove that they belong to one of these categories – a

procedure often as time-consuming and even more cumbersome than applying for a visa. The UK and Ireland have so far ignored the Soysal ruling.

All this points towards an obvious conclusion: both legal and security arguments suggest that it is in the mutual interest of the EU and Turkey to start a process whereby Turkish citizens will get visa-free access to all EU countries in return for reforms and cooperation.

To get the ball rolling, the European Commission should immediately open a visa dialogue aimed at visa liberalization with Turkey. It should offer Turkey a visa liberalization roadmap similar to the one handed to the Western Balkan states in 2008. This does not require any decision by EU member states.

Meanwhile, Turkish officials should embark on a tour of European capitals explaining to their counterparts that a visa liberalization process based on a roadmap –and improved practical cooperation along the Greek-Turkish border– is in the interest of both sides. They should stress sotto voce that an orderly visa liberalization process is a better alternative to a scenario whereby visa-free travel is eventually imposed on EU member states by their own courts.

In exchange for a roadmap Turkey should sign the readmission agreement with the EU, which, by itself, will in any case change very little for either side. More importantly, Turkey should begin working with Frontex to reduce illegal migration to Greece. Here, progress could be immediate and would be measurable.

Progress towards visa liberalization for Turkish citizens would create a win-win situation. Reforms necessitated by the roadmap process would improve the human rights situation in Turkey. The situation of illegal aliens, for one, would benefit from changes to Turkey's asylum system. Increased Turkish cooperation with Frontex would help Greece remain in Schengen and allow Bulgaria and Romania to join

¹⁸ Visa exemption for Turkish citizens who are to perform a service in Denmark, *Danish Immigration Service*, http://www.nyidanmark.dk/en-us/coming_to_dk/visa/need_visa/visa_exemption_turkish_service_in_denmark.htm

without further delay. EU-Turkey relations would improve. Visa-free travel would also be good for Turkish students and business people, and tourism from Turkey could provide a boost to European economies, especially Greece.

Such a breakthrough would also send a powerful signal to Turkish officials and citizens that EU politicians actually mean it when they talk about respect for the rule of law, for court decisions and for international commitments. Such a signal is needed today.

It is, in the end, a simple matter of common interests.