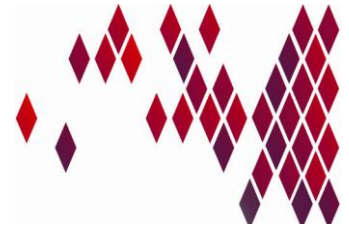


European HIV Legal Forum Survey Final Report

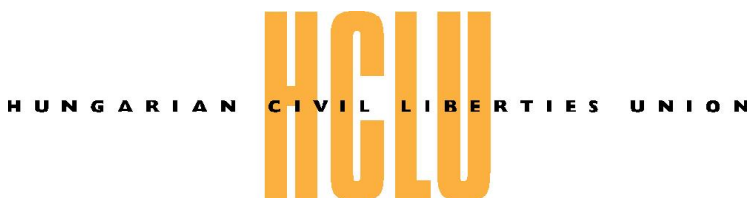
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Contributors

- England:** Yusef Azad - National AIDS Trust
- Hungary:** Ferenc Bagyinszky - Hungarian Civil Liberties Union
Dr. Alexandra Balázs - National Healthcare Funds
Rita Bence - Hungarian Civil Liberties Union
- Italy:** Lella Cosmaro - LILA Milano
Salvatore Geraci - Caritas Roma - Area Sanitaria
Tullio Prestileo - ANLAIDS Onlus - INMP Sicilia
Laura Rancilio - Caritas Ambrosiana
- Netherlands:** Ronald Brands - Soa Aids Nederland
Jasper van Amen - College voor zorgverzekeringen
Martine de Schutter - AIDS Action Europe
- Switzerland:** Harry Witzthum - Swiss Aids Federation
Kurt Pärli - University of Applied Sciences Zürich/Winterthur





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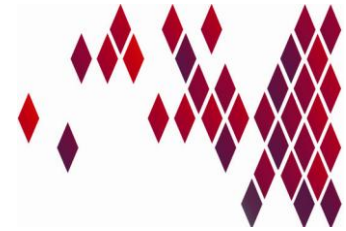
1 Introduction

AIDS Action Europe’s mission is to bring together civil society to work towards a more effective response to the HIV epidemic in Europe and Central Asia. As a partnership of over 400 AIDS-related non-governmental organisations from currently 46 European and Central Asian countries, we strive for the best standards of human rights protection and universal access to prevention, treatment, care and support. In 2012, AIDS Action Europe developed the first steps of a new initiative, the **European HIV Legal Forum**. This evolved from earlier work, including recommendations resulting from the European Best Practice Seminar on Legislation and Judicial Issues in relation to HIV/AIDS, co-organised between AIDS Action Europe and the National AIDS Trust in 2007. There was a growing interest within our Steering Committee and network to inform each other and take joint action on legal issues related to HIV. The **European HIV Legal Forum** aims to bring together legal and policy experts to jointly monitor, advise and act where and whenever human rights of people living with HIV and of key populations are at risk.

The Forum kicked-off with a pilot phase initiated by five AIDS Action Europe member organisations: Swiss AIDS Federation, LILA Milano, Hungarian Civil Liberties Union, National AIDS Trust (UK) and STI AIDS Netherlands. In this first stage, the members decided to focus on the legal situation of migrants in an irregular situation that are living with HIV in relation to access to healthcare. It is believed that such comparative analysis of the legal situations in different countries will identify good practice and innovative solutions consistent with international human rights, and act as a catalyst for change where practice remains poor. A survey was set out in the five countries on legal issues in access to healthcare services and health insurance for migrants living with HIV in an irregular situation. In the following chapter the survey results are presented by survey question.



The survey has been carried out through voluntary contributions of the five member organisations as well as support for the AIDS Action Europe office through a financial contribution from, amongst others, the Second EU Public Health Programme (2008-2013) through the Executive Agency for Health and Consumers.



2 Survey Results

The survey was sent out early November 2012 and consisted of nine questions. Each country had a policy focal point and a legal focal point who worked together to gather the information from respondents in-country. Based on the responses to the survey, each AIDS Action Europe member organisation focal point drafted one national survey report, which was submitted to the AIDS Action Europe office who compiled the overall survey report.

The following are the individual country responses by survey question:

2.1 Does your country of residence have a constitution or other legal document that guarantees the right to health?

England: No. The United Kingdom does not have a written constitution and there is no right to health as such, beyond the possible health-related implications of the European Convention on Human Rights which is enshrined in law in the Human Rights Act 1998, and which established the principle of the precedence of human rights considerations in the development and implementation of policy and practice in public services. These rights are justiciable within the domestic courts. Article 35 of the European Charter of Fundamental Rights also applies. There is an 'NHS Constitution' which has some legal status through the Health Act 2010 - the NHS has a legal obligation to pay 'due regard' to the pledges contained in the NHS Constitution in its decisions.

Hungary: Yes. The Fundamental Law of Hungary Article XX. (1) Every person shall have the right to physical and mental health. (2) Hungary shall promote the exercise of the right set out in Paragraph (1) by ensuring that its agriculture remains free from any genetically modified organism, by providing access to healthy food and drinking water, by managing industrial safety and healthcare, by supporting sports and regular physical exercise, and by ensuring environmental protection.

Italy: Yes. Two articles of the Italian Constitution and some state laws and regional laws. The Italian Constitution, art. 32: The Republic protects health as a fundamental right of each individual and as the interest of the community, and guarantees free assistance and treatment to the poor.

Netherlands: No.

Switzerland: The Right to Health is not guaranteed as a self-executing right, however, article 41, article 117 and article 118 of the Federal Constitution of the Swiss Confederation proclaims that the state has an obligation to provide for best conditions of people's health. Furthermore: Resulting from the unwritten fundamental right to the minimum subsistence recognised by the Federal Tribunal in 1995, the right to obtain help in situations of distress is explicitly rooted in article 12 of the Federal Constitution of the Swiss Confederation and guarantees for persons in situations of distress "the right to assistance and care, and to the financial means required for a decent standard of living.. Article 12 of the Federal Constitution of the Swiss Confederation also enshrines the right to receive 'basic' health care, irrespective of one's nationality, residence or insurance status. Accordingly, undocumented migrants have the right to access and benefit from health care services (to a lesser extent than those provided by the Federal Health Insurance Law) even without insurance coverage.



On 1 January 1996 the Swiss Federal Law on Compulsory Health Care (LAMal) of 18 March 1994 entered into force. This law instituted mandatory healthcare insurance and an optional insurance scheme to compensate for the loss of daily earnings. The health insurance provides for payments in case of sickness, accidents (unless covered by a separate accident insurance policy) and maternity. All persons domiciled in Switzerland must be insured for sickness and accidents within three months of taking up residence, or from the time of birth in Switzerland. However, in accordance with article 3, par. 2, of LAMal, the Federal Council may exempt certain categories of persons from mandatory health insurance, in particular representatives of foreign State and officials of international organisations.

2.2 What is the estimated number of irregular migrants in your country?

England: Estimates about the size of the irregular migrant population in the UK are limited. The most recent estimate suggests a range of 417.000 to 863.000 irregular migrants (central estimate 618.000) at the end of 2007.

Hungary: The estimated number of irregular migrants vary from 30.000 – 50.000 to 150.000 the maximum (source: Healthcare in Nowhereland – improving services for undocumented migrants in the EU – Policies on Healthcare for Undocumented Migrants in EU27 - Country Report Hungary 2010).

Italy: There are no official data available, only estimates. According to the most recent and reliable, illegal migrants are estimated to be about 10% of regular migrants. So, there are about 400.000.

Netherlands: last estimated number: 97.000 in the period 2009.

Switzerland: Around 80.000 – 100.000 (Source: Data from the Swiss Office of Public Health, 2005).

2.3 What is the estimated number of irregular migrants in your country living with HIV?

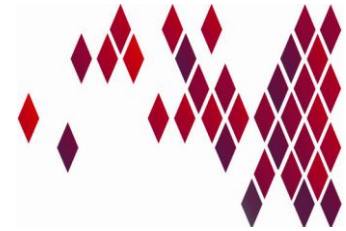
England : Unknown - but National AIDS Trust, extrapolating from a survey in 2004 of HIV clinic data which included residency status of HIV positive patients calculated that for 2010 there might be about 900 irregular African migrants living with HIV in England - to which an additional number needs to be added for those from other regions - perhaps increasing the number to something over 1.000.

Hungary: No data available.

Italy: The last report published by Istituto Superiore della Sanità/Centro Operativo AIDS in occasion of Dec. 1st (27/11/2012) – indicates that 1/3 of new diagnoses relates to foreigners. In 2010 we had 1081 new diagnoses related to foreigners (984 of whom are resident in Italy) and in 2011 we had 1.091 (951 of whom are resident in Italy). These are the only data we have. If the data are correct, also in such case irregular migrants should count for about 10% of legal migrants, but at present it appears we can only try and estimate the number of new diagnoses among illegal migrants in the last two years. Nobody wants to risk giving additional figures.

Netherlands: Unknown.

Switzerland: No data available.



2.4 How is healthcare financed for nationals/citizens?

England: The National Health Service (NHS) is funded from direct taxation.

Hungary: Most of the health care services are financed through the National Healthcare Fund, which is the only and compulsory state health insurance.

Italy: It is financed by the Servizio Sanitario Nazionale (National Health Service) through its regional "Servizi Sanitari Regionali". SSN is funded through general taxation (direct and indirect). Such a system foresees the share of the costs paid by citizens through fees ('tickets') which are proportional to income and social status (e.g. no cost for the unemployed) or health status (e.g. no costs for certain diseases).

Netherlands: Social insurance system.

Switzerland: Paying for monthly premiums under a health insurance plan in the context of the Swiss Federal Law on Compulsory Health Care (LAMal).

2.5 How is healthcare financed for non-nationals who are lawfully resident?

England: Lawfully resident non-nationals also access NHS service funded from direct taxation.

Hungary: Health care is financed through the National Healthcare Fund, which is the only and compulsory state health insurance. (same as above) Citizens of the European Union are entitled to similar services as nationals/citizens in the territory of Hungary. Lawfully residents are also entitled to healthcare services as a) they have health insurance due to having an address and NHF number or b) for registered migrants (not having an NHF number) for a year period from registration. To receive residential status or a long-term stay visa in Hungary (including work and study permits) you need to make a declaration at the Medical Office about your medical status re HIV, syphilis, TB, hepatitis and typhoid. In case you declare a positive status in the above diseases the Medical Office makes a recommendation to the Immigration Office about accepting or refusing your application. The practice is not very clear and information is contradictory.

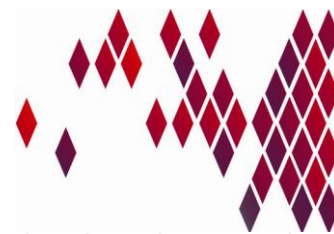
Italy: In cases where people work or study in Italy, or if they are family members of an individual working in Italy, or if they are refugees or resident in Italy for humanitarian reasons, it is financed by the Servizio Sanitario Nazionale through its regional "Servizi Sanitari Regionali". SSN is funded through general taxation (direct and indirect). Such system foresees the share of the costs paid by citizens through fees ('tickets') which are proportional to income and social status (e.g. no cost for the unemployed) or health status (e.g. no costs for certain diseases).

Netherlands: Social insurance system.

Switzerland: Paying for monthly premiums under a health insurance plan in the context of the Swiss Federal Law on Compulsory Health Care (LAMal).

2.6 How is healthcare financed for irregular migrants (if at all)?

England: NHS services accessed by irregular migrants is in some instances free of charge and funded as are



most NHS services by direct taxation. For many hospital services, however, the irregular migrant is expected to pay charges so that the NHS can recoup its relevant costs.

Hungary: Health care for irregular migrants is only financed in case of medical emergencies and lifesaving interventions. Treatment for acute medical conditions are also financed for irregular migrants in certain conditions: treatment, care and vaccinations that are of public health interest and in situations of catastrophe. .

Italy: It is financed partly by the Servizio Sanitario Nazionale through its regional "Servizi Sanitari Regionali". It is funded through specific funds approved by the CIPE (Comitato Interministeriale per la Programmazione Economica) and through the Ministry of Internal Affairs. Coverage of health costs is not fully provided; however essential care and urgent care are ensured, including long term care, for certain specific conditions, e.g. pregnancy, but also transmittable infectious diseases, including therefore HIV.

The different Regions enforce National laws differently, providing different coverage. In the Lombardy Region, access to primary care is not provided, and primary care is generally guaranteed by NGO services, which can in some cases prescribe tests and treatments with the same prescription procedures followed by the National Health system. HIV diagnosis and care, as well as hospitalisation in hospices and day centres are ensured at the same conditions guaranteed to Italian citizens.

Netherlands: Healthcare providers can apply for compensation for the unpaid costs of medical necessary care for irregular immigrants.

Switzerland: Irregular migrants are also theoretically covered by the Swiss Federal Law on Compulsory Health Care (LAMal) as long as they pay the monthly premiums, and undocumented migrants also have access to medical services in emergency situations.

2.7 Does the following apply with respect to nationals / citizens and lawfully resident non-nationals in your country?

APPLIES WITH RESPECT TO NATIONALS / CITIZENS AND LAWFULLY RESIDENT NON-NATIONALS IN YOUR COUNTRY?	England	Hungary	Italy	Netherlands	Switzerland**
There is free HIV testing	yes	yes	yes	yes	no
There is free HIV treatment	yes	yes	yes	yes	no
There is free STI (other than HIV) testing	yes	yes	yes *	yes	no
There is free STI (other than HIV) treatment	yes	yes	yes	yes	no
There is free treatment for acute medical conditions in hospital	yes	yes	yes	yes	yes
There is free treatment for chronic medical conditions (other than HIV infection) in hospital	yes	yes	yes	yes	no
There is free treatment for medical emergencies	yes	yes	yes	yes	no
There is free treatment in primary care	yes	yes	yes	yes	no

* In some cases, payment of a partial amount – “ticket”- is required.



** Health care access is guaranteed on the basis of the obligatory basic health insurance scheme with a monthly premium. If you only have a compulsory basic insurance scheme, you are obliged to make a contribution towards your total annual medical cost, up to a certain limit per year (minimum CHF 300), which can be chosen freely and which has an effect on the amount of the monthly premium. So even though access to health services is given once a person has a health insurance coverage and pays the monthly premiums, still the financial burden of the monthly premium and the required financial contribution required with the health insurance policy can be a financial burden and therefore a barrier. See point 2.9. for further clarification.

2.8 Does the national law in your country provide any of the following for irregular migrants FREE OF CHARGE

DOES THE NATIONAL LAW IN YOUR COUNTRY PROVIDE ANY OF THE FOLLOWING FOR IRREGULAR MIGRANTS FREE OF CHARGE	England	Hungary	Italy	Netherlands	Switzerland
There is free HIV testing	yes	yes	yes	yes	no
There is free HIV treatment	yes	no	yes	no	no
There is free STI (other than HIV) testing	yes	no	yes	no	no
There is free STI (other than HIV) treatment	yes	no	yes *	no	no
There is free treatment for acute medical conditions in hospital	no	yes	yes *	no	yes
There is free treatment for chronic medical conditions (other than HIV infection) in hospital	no	no	yes	no	no
There is free treatment for medical emergencies	yes	yes	yes	no	no
There is free treatment in primary care	yes	no	yes/no**	no	no

* In some cases, payment of a partial amount – “ticket”- is required.

** In the case of the difference, such difference depends on different regional legislations. In the Lombardy region there is no access to primary care for illegal migrants.

2.9 If there is no national legal entitlement to HIV treatment for irregular migrants, is there nevertheless access in practice as a consequence of international human rights obligations or otherwise? (Please explain, with examples if possible)

England : Free treatment for irregular migrants was only introduced in England from 1 October 2012 as a result of the National Health Service (Charges to Overseas Visitors) Amendment Regulations 2012 (S.I 2012 No.1586), a piece of secondary legislation (i.e regulations made by order of the Secretary of State) where there was only very limited possibility of parliamentary scrutiny (and that option was not taken up in this instance by



Parliament). Prior to this change in the law, HIV treatment was chargeable for irregular migrants - but even then because of human rights considerations (especially Art 3 of the ECHR) it was considered that HIV treatment was to be deemed 'immediately necessary treatment' because it is life-saving and life-preserving - this meant whilst treatment would be charged for it would never be denied, delayed or withheld because it was chargeable or because the migrant could not demonstrate ability to pay.

Hungary: Treatment for medical emergencies and for certain acute medical conditions are free even if someone does not have a valid insurance or status in the country. The Annex 1 of Ministry Degree on Emergency Healthcare Services 52/2006 (XII. 28.) list infectious diseases that in themselves or their neopathy can cause life-endangering conditions. Section 3 of the Healthcare Act defines emergency as such a change in health condition as a result of which the patient would get into life-threatening condition or sustain permanent or severe health damage. Based on these provisions, ARV could be listed as a life-saving intervention. We are investigating this issue with the Ministry at the moment.

Italy : We have laws which guarantee HIV treatments for irregular migrants. It seems important to suggest that efforts should be made to facilitate access and continuity of care for health and social services; in fact, as it is known, very often irregular migrants with HIV are diagnosed at a late stage of the infection (late presenters).

Netherlands: Healthcare isn't free in the Netherlands, but citizens and lawful residents are obliged to obtain an healthcare insurance, an "basisverzekering" and pay premiums. Government decides which care must be in this insurance (basisverzekering). Non-residents are not allowed to have this social insurance. If they have no other healthcare insurance and they need medical necessary care, they have to pay for this care. If they can't, then the health care provider is sometimes able to apply for a compensation by the government. Not all health care providers are able to apply for this compensation. For example: only hospitals with a contract with CVZ can apply for compensation for the costs of HIV care given to illegal aliens.

Switzerland: Yes. The following is very important to understand questions 5, 6 and 7: People living in Switzerland must have an health insurance by law, and all health insurers are obliged to cover basic services for everyone, irrespective of nationality or documented or undocumented status - as long as the persons pay their monthly premiums (which can vary from canton to canton). If the premiums are paid, then medical services and access to medical services are free of charge (factually for all legal residents, theoretically for undocumented migrants - see my comments under point 8), but there are conditions to be taken into consideration. In Switzerland, health care access needs to take into consideration a "franchise" and a "retention", which defines the maximum amount a person will have to cover of the medical costs of a certain treatment. What is a 'franchise'? This is an amount of money that you elect to pay before claiming on your health policy, similar to 'excess' or 'deductible' on car insurance in order to reduce the cost of the premium. It is worth bearing in mind that the franchise operates on an annual basis and not on a per-case basis. Therefore should you have a claim that crosses two financial years then you will pay two separate amounts even if it is for the same illness or accident. What is a 'retention'? This is the amount you must pay towards the cost of your health care. Typically it is 10% of the cost of treatment/medication. First you must pay your franchise and then once the cost of health



care exceeds your franchise then you pay 10% of the costs up to a maximum of 700 CHF. I.e. – you get 90% of your bills refunded until you reach 700 CHF and then you get 100%. Both these conditions are important to take into consideration, when discussing the access to medical services of undocumented migrants. So - in principle medical services are free of charge (as long as people pay their monthly premiums, and take into consideration the franchise and the retention). This is also valid for undocumented migrants. That is why I haven't clicked free of charge in question point 5 and 6 above - because it is dependent on the payment of monthly fees and the franchise. But once the monthly premiums are paid, medical procedures and HIV therapies are "free of charge". A special point related to HIV-Testing: In Switzerland there are two ways of accessing HIV-Testing. If the test is done in a medical cabinet and is provider initiated, then the health insurance policy covers the costs (but taking the franchise and the retention into consideration) and the test is done in a name-based way. There is also the possibility of accessing HIV testing in an anonymous way at certain testing facilities where the person does not have to give his or her name, then the person has to pay for the test, which will be around CHF 50.

2.10 Please specify any other differences in accessing HIV testing and/or treatment between nationals and irregular migrants.

England: None for HIV treatment - it should be noted that other treatment which may not be directly HIV-related but which has a significant impact on the well-being of the HIV positive patient (including how well they manage their HIV infection) may still be charged and thus hard to access, with negative consequences. Furthermore, whilst primary care is free, a General Practitioner is not required in law to accept an irregular migrant on their patient register - it is a matter for the GP's discretion, the only requirement being that such discretion is not exercised in an unlawfully discriminatory way. Thus some irregular migrants have difficulty accessing primary care which again can have harmful consequences, including for the management of their HIV given the current emphasis on 'shared care' between the HIV clinic and the patient's General Practice.

Hungary: Anonymous and free HIV testing in theory is available for anyone, regardless of their status, as at these facilities you are not required to produce any documents. To receive free HIV treatment, you are required to have state health insurance, as it is not listed amongst the lifesaving treatments that could be available regardless of having a state insurance.

Italy: Differences are not due to legislation or barriers to access, but to difficulties in accessing testing and treatment (information, ignorance, cultural and language barriers).

Netherlands: see answer above.

Switzerland: Even though undocumented migrants are theoretically able to access medical services - as they must be covered by health insurance and health insurers must cover them by law - the reality looks different. In a review that the Federal Council released in 2012 it was observed that up to 80% of undocumented migrants do NOT take on a health insurance, which is due to two reasons: 1. the financial situation of undocumented migrants is often dire, so that these persons cannot afford to pay the high monthly premiums 2. out of fear of being detected and deported, undocumented migrants often do not seek cover by health insurances as they



fear that they will be uncovered by the administrative procedures health insurers apply in case the premiums are not being paid. That is why the majority of undocumented migrants do not enjoy health insurances in Switzerland, even though they would have a right to health services.

2.11 Is there any difference in law and / or practice on availability of HIV healthcare between adults who are irregular migrants and children who are irregular migrants?

England: No difference because HIV treatment is now free for all irregular migrants. It is worth pointing out more generally that healthcare for the children of irregular migrants is charged for in exactly the same basis as for adults - the one exception is unaccompanied children who are allowed to access NHS care free of charge.

Hungary: No.

Italy: No, in theory. In the last few years a campaign has been conducted in order to guarantee to irregular migrants' children not only health rights equal to those of Italian citizen (they are already guaranteed the same rights) but also equal access to the health system (paediatrician of free choice).

Netherlands: No.

Switzerland: No.

2.12 Are Legal services available to irregular migrants in your country free of charge?

England: Legal aid can be hard to access but there is no difference in access based on migration status - access is based on means and the merits of the case.

Hungary: Yes, several organizations offer free legal services to irregular migrants: Menedék: Hungarian Association for Migrants, Helsinki Committee, Hungarian Civil Liberties Union.

Italy: They are offered free of charge only through the voluntary work of legal experts and lawyers in NGOs.

Netherlands: Yes.

Switzerland: Yes. The Swiss Aids Federation has a legal counselling service that is offered by the umbrella organisation on the national level and the Groupe Sida Genève (a regional member) in the French speaking part of Switzerland.

2.13 Are Mental health services available to irregular migrants in your country free of charge?

England: Only for emergencies and in primary care.

Hungary: No.

Italy: Yes, normally accessible, same as for Italian and migrants with regular stay permit. In the Lombardy region illegal migrants are treated in the hospital for acute mental ill conditions, but then they are not treated afterwards for routine follow-ups. Answers differ according to region.



Netherlands: No.

Switzerland: No.

2.14 Is Education available to irregular migrants in your country free of charge?

England: Yes to 18, after that overseas fees apply.

Hungary: No.

Italy: Yes, same conditions granted as those of Italian citizens. Access to education and to the school system is guaranteed by law. There remain difficulties due to language barriers and cultural barriers, which are encountered both by regular and illegal migrants. A good proposal is that of guaranteeing cultural mediation, and to train school personnel in transcultural issues.

Netherlands: Yes (until 18 years old it is free of charge).

Switzerland: No.

3 Conclusions and next steps

Overall, in the five countries knowledge about the estimated number of irregular migrants living in the country is poor, and especially so on the number of them living with HIV. When we don't know how many people are in need of services, it is hard to tailor services to their specific needs.

In countries with a tradition of strong regionally organised systems of health and services and funding systems it is rather complex to get a national picture.

Insurance-based systems, like Switzerland and the Netherlands, seem to mean, at least in practice, less access to free HIV treatment, in comparison to direct taxation systems like England and Italy.

Fortunately, in all countries irregular migrants do seem consistently to have access to lifesaving and emergency care.

The example from Switzerland shows that although in theory health insurance might be accessible to irregular migrants on the same basis as for anyone else, in practice, because migrants usually find themselves in insecure financial situations, a high percentage is uninsured and in practice not able to access health services. Out of fear of being detected and deported, undocumented migrants often do not seek cover by health insurance as they fear that they will be uncovered by the administrative procedures health insurers apply in case the premiums are not being paid. That is why the majority of undocumented migrants do not enjoy health insurances in Switzerland, even though they would have a right to health services.

In England, and possibly Hungary, there has been success in arguing for access to free HIV treatment on the basis of public health benefits, since it is an infectious condition in the absence of treatment.

The questionnaire has led to some valuable insights into the differences in health systems and its effects on



access to treatment and services for irregular migrants in the five countries that participated in this pilot survey. The member organisations took approaches from other countries home as lessons learned to share with stakeholders at the national level. The preliminary results of the survey were also presented at the EU HIV/AIDS Civil Society Forum meeting December 2012 in Luxembourg.

As a next step the European HIV Legal Forum aims to involve more countries in our initiative. We aim to highlight good examples like England, where free access to HIV treatment for irregular migrants is guaranteed even in economic difficult times. By jointly advocating to Governments in Europe, using good practice examples with clear public health benefits, we aim for free treatment for all irregular migrants and improved access to services and health insurance in countries where this isn't the case at present.

If you are interested to become closer involved in the activities of the European HIV Legal Forum, please contact the AIDS Action Europe office at office@aidsactioneurope.org