

Europe's enforcement paralysis

ICCL's 2021 report on the enforcement capacity of data protection authorities

Foreword

This report uncovers a paralysis at the heart of the GDPR. Data protection authorities (DPAs) are unable to act against Big Tech in major GDPR cases. We reveal why this is (**pages 3-10**), and how to fix it (**page 11**).

The recent WhatsApp decision notwithstanding, the Irish Data Protection Commission (DPC) has failed to send draft decisions to its European colleagues on a very large number of major EU-wide cases. This makes it impossible to police how Google, Facebook, Apple, and Microsoft, use people's data across Europe.

Ireland is the GDPR's worst bottleneck. But there are other problems, too.

Covid-19 has forced many to adapt to digital life.¹ Despite this, Europe's DPAs have not configured themselves for digital era. They still

lack tech specialists who can investigate what Big Tech does with people's data.

DPA budget boosts have also declined every year since the GDPR, which indicates that national governments are not committed to the GDPR's proper application.

The European Commission is at fault, too. It has the duty under the EU Treaties to ensure that EU law is applied. But the Commission has inadequate data to judge whether the GDPR is applied correctly.

There is no consistent view across the European Economic Area (EEA) of whether or how often lead DPAs use their investigative powers, or what specific powers are used. Nor is there an adequate overview of what precise sanctioning powers are used. As a result, the GDPR is silently failing.

The European Commission is quiescent. Distracted by the next generation of legislation, the Commission has neglected the GDPR.

The fanfare surrounding the GDPR was such that the EU's global influence will wane if it is allowed to fail.

Consumers will suffer too, because innovative startups and venerable news publishers will be unable to compete with Big Tech's entrenched internal data free-for-alls.

The worst cost will be that continuing data misuse will tyrannise citizens, and debase politics.

The European Commission must urgently intervene.

Johnny Ryan

Alan Toner



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Europe is unable to police how big tech firms use people's data. Three and a half years after the introduction of the GDPR, EU GDPR enforcement against Big Tech is paralysed by Ireland's failure to deliver draft decisions on major cross-border cases. In addition, Europe's DPAs remain underfunded, and have too few tech specialist investigators.

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Key insights

EU-wide DPA enforcement of the GDPR against Big Tech is paralysed as a result of a failure of the Irish DPC to send draft decisions to the European Data Protection board (EDPB).

- The Irish Data Protection Commission is the bottleneck of GDPR enforcement against Big Tech across the EU. **Almost all (98%) major GDPR cases referred to Ireland remain unresolved.**
- Though Covid-19 has forced many Europeans to work online,¹ **DPAs remain ill equipped to supervise the tech sector.** Only 9.7% of EU DPAs 3,014 full time staff are tech specialists.
- **Less than half (44%) of EDPB final EU-wide decisions include corrective measures, such as fines or orders to stop processing.**
- A small number of Member States (**Ireland, Spain, Germany, Netherlands, France, Sweden, and Luxembourg**) receive almost three quarters (72%) of all cross-border complaints referred between DPAs.
- EU countries' **investment in DPAs is declining.**
- **Germany alone** accounts for **almost a third (32%) of all spending on EU DPAs** that oversee the private sector. **More than half** of all national DPAs have small (**€5 million or less**) annual budgets.

98%

major EU cases not yet decided by the Irish DPA.

14

GDPR enforcers have annual budgets smaller than €5M.

9.7%

of staff at European DPAs are tech specialists.

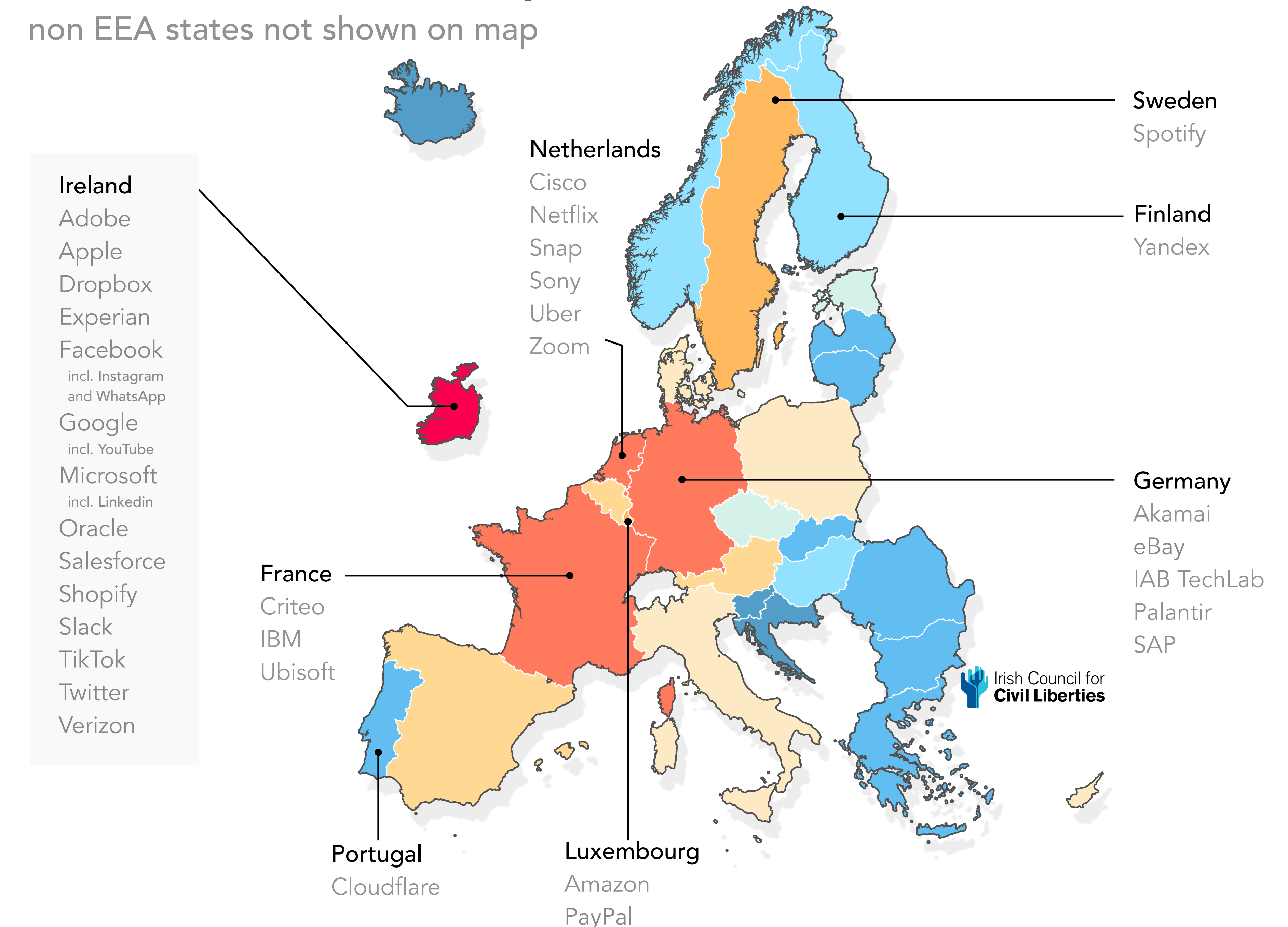
Most important “one stop shops”

Ireland is first among a few countries that dominate as lead supervisory authorities for major cross-border cases.

The findings:

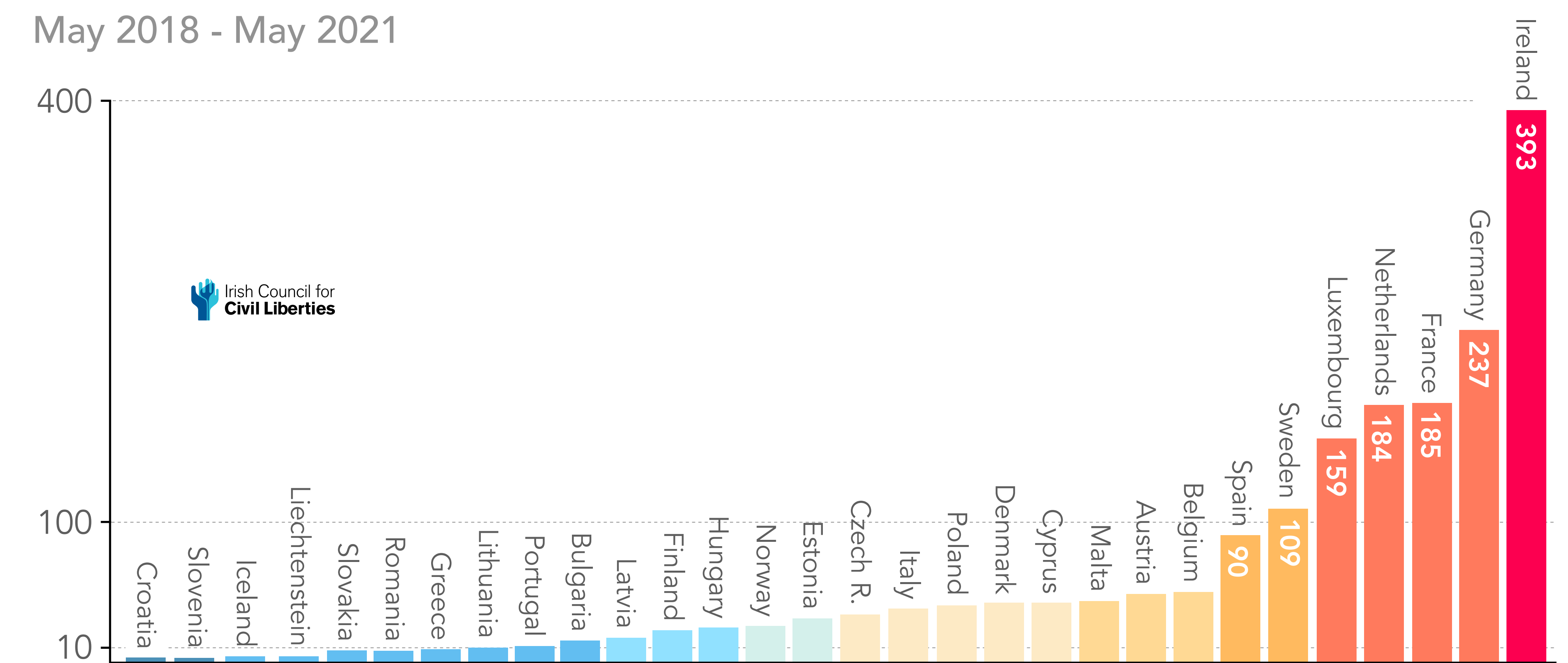
- The **Irish DPC** is the “lead” authority for **Google, Facebook, Apple, and Microsoft** across the EU, because these firms are headquartered in Ireland.
- **A fifth (21%) of all complaints** referred between DPAs are referred to the Irish DPC.
- Together with **Ireland**, six other countries (**Spain, Germany, Netherlands, France, Sweden, and Luxembourg**) receive almost **three quarters (72%) of all complaints referred** between DPAs.

Lead authorities of major tech firms non EEA states not shown on map



Complaints referred to lead authorities by other DPAs

May 2018 - May 2021



Ireland is the big EU bottleneck

The findings:

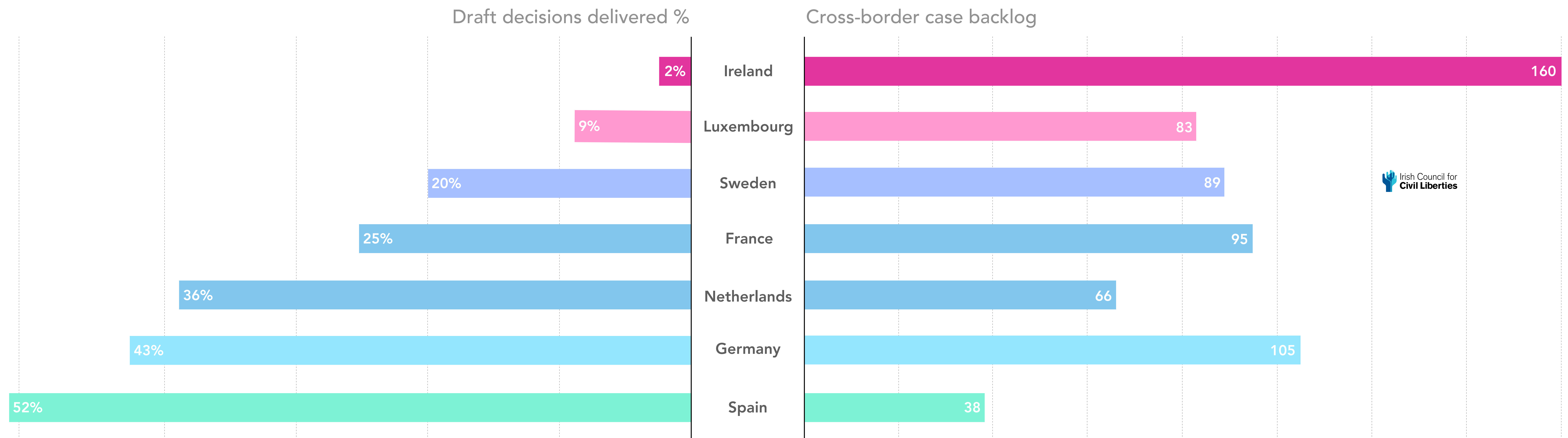
- The Irish DPC is the lead supervisory authority for **164 cases** of Europe-wide significance. But **98% of these cross-border cases remain unresolved**. In the three years from May 2018 to May 2021 Ireland has sent only 4 draft decisions to the EDPB.

The bottom line:

No other GDPR enforcer in the EU can intervene if the Irish DPC asserts its lead role in cases against big tech firms headquartered in Ireland. As a result, EU GDPR enforcement against Big Tech is paralysed by Ireland's failure to deliver draft decisions on cross-border cases.

National backlogs delaying major European cases

as of May 2021



Despite funding increases, Ireland remains bottleneck

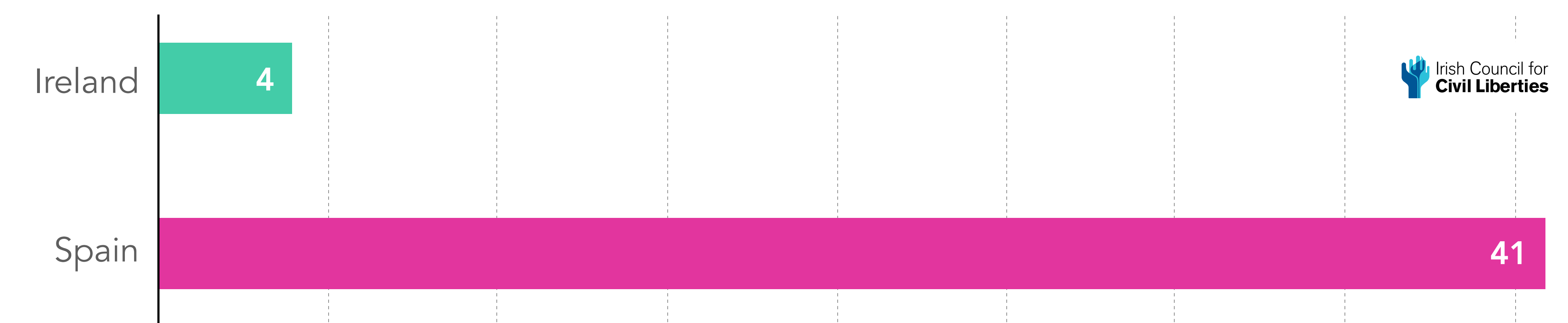
The Irish DPC is the most important enforcer of the GDPR, but continues to fail to act despite increased resources.

The findings:

- Ireland's DPC was **chronically underfunded for two decades**, but now **ranks fifth among EU DPAs** for budget.
- **Spain's AEPD** produced **more than ten times** the number of draft decisions than Ireland's DPC as a lead authority, **despite a smaller budget**.
- In July 2021, the **Irish Parliament and Senate Justice Committee published a new report noting the need to reform the Irish DPC.**² It recommends that the DPC urgently "move from emphasising guidance to emphasising enforcement".

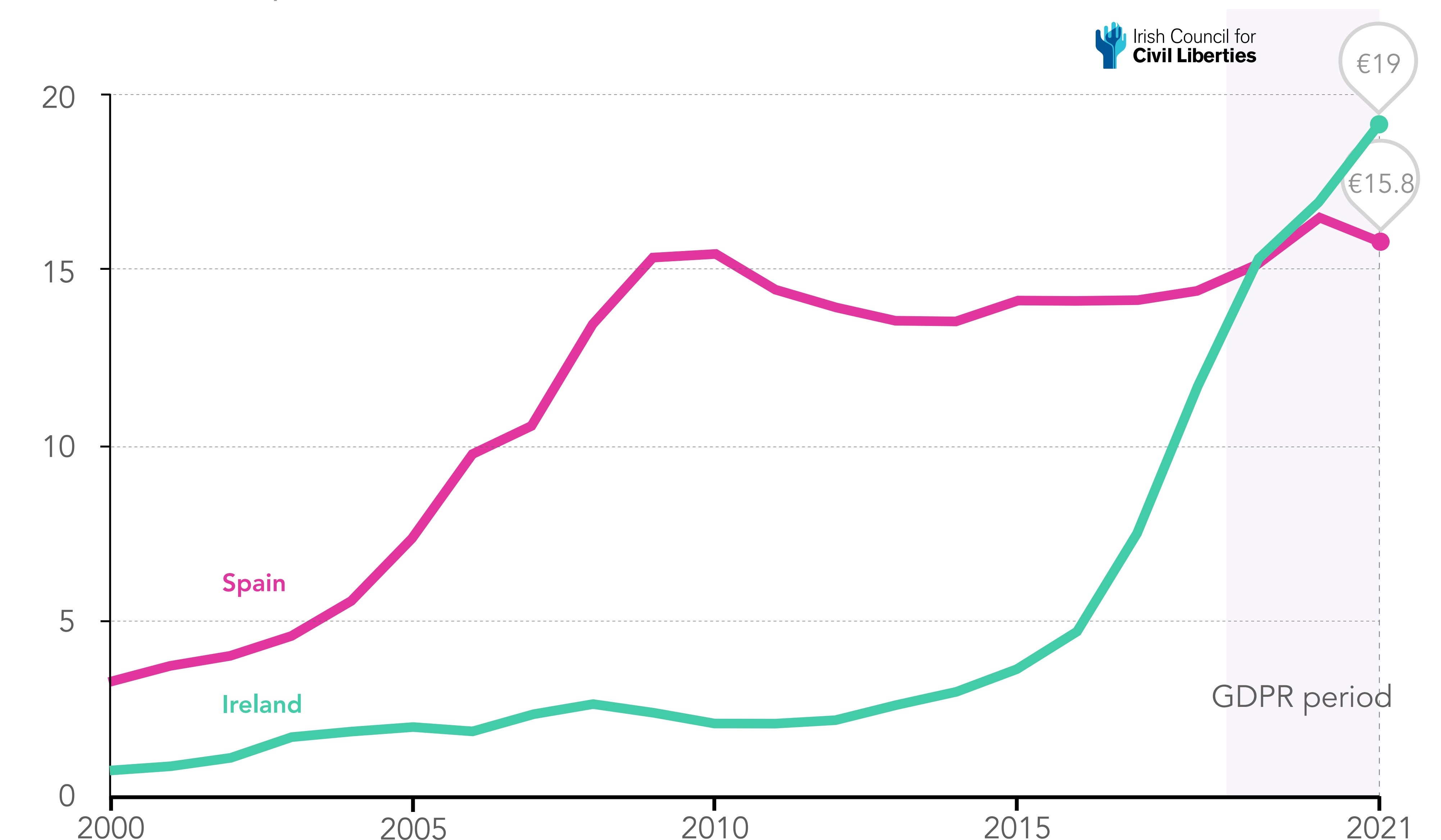
Spain's AEPD produces 10 times more draft decisions than the Irish DPC

draft decisions on EU cross-border cases as lead authority, May 2018 - May 2021



Irish DPC budget now surpasses Spanish AEPD

millions of Euro, rounded



Few EU-wide corrective actions agreed

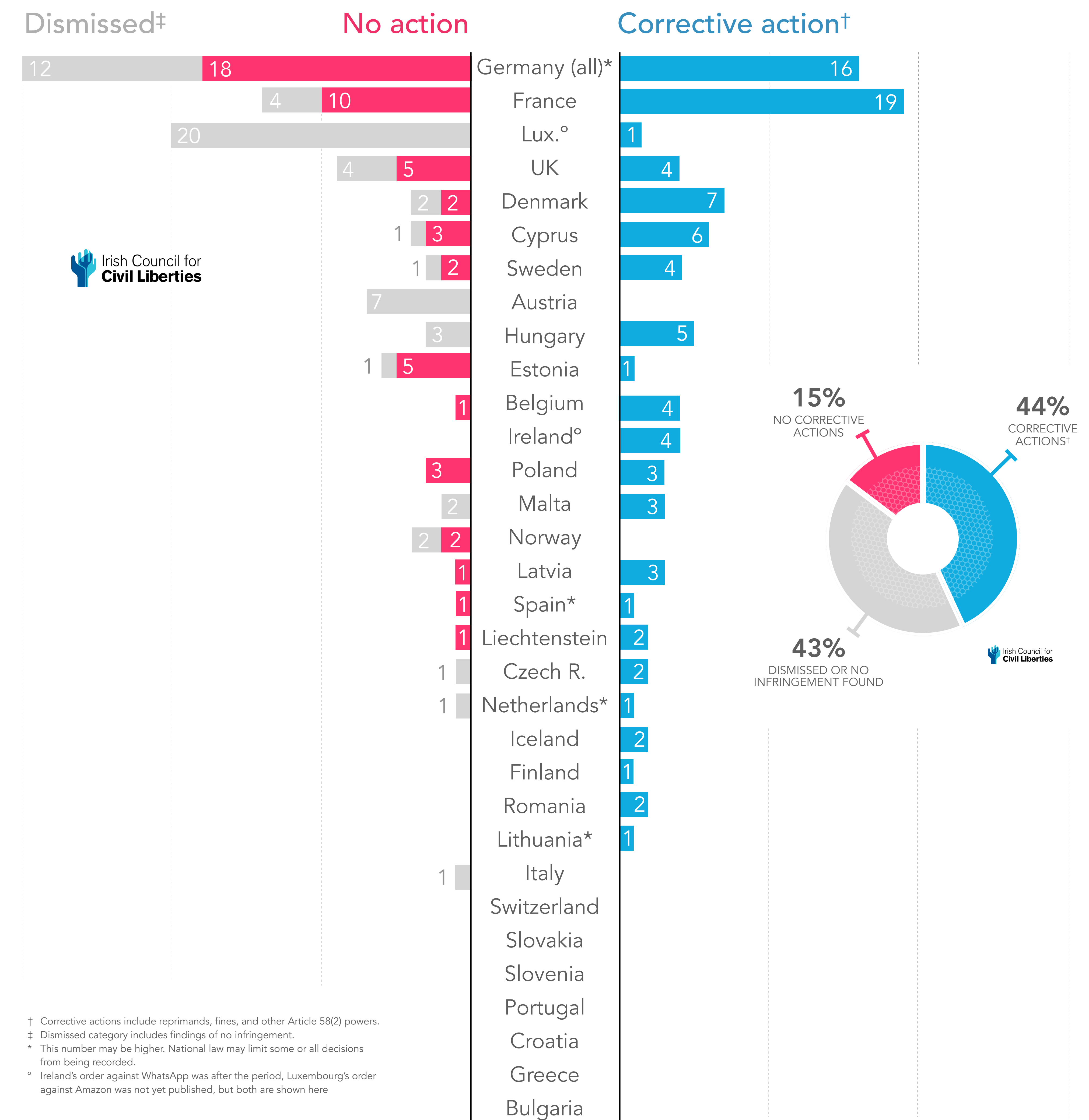
Major EU cross-border cases are slow, and few result in corrective action.

The findings:

- The European Data Protection Board confirmed decisions in **197 cross-border cases** between May 2018 and July 2021. These cross-border cases are significant enough to concern several Member States.
- **Less than half** (44%) of the final decisions at the European Data Protection Board **resulted in corrective action**.

Final EU-wide decisions

25 May 2018 - 21 July 2021, counts of cases that included any corrective actions



Decisions focus on data subject rights

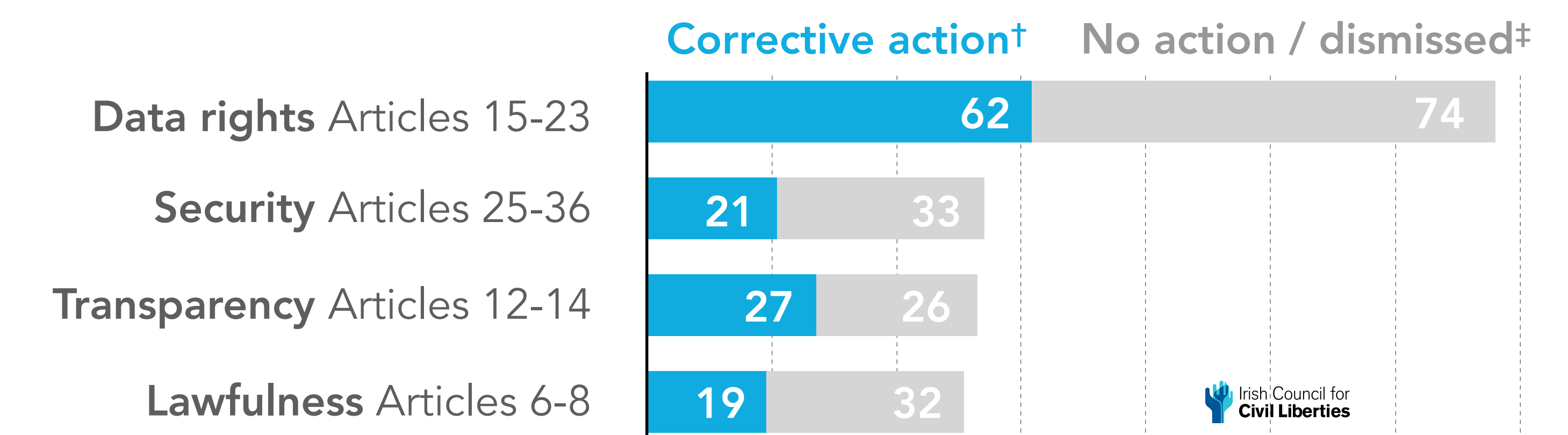
EU-wide decisions from the EDPB focus on specific GDPR articles.

The findings:

- **Data subject rights** are the most frequent issues in cross-border decisions so far. The **right to erasure** (the right to be forgotten) is the most frequent of these.

Subjects and outcomes of final EU-wide decisions

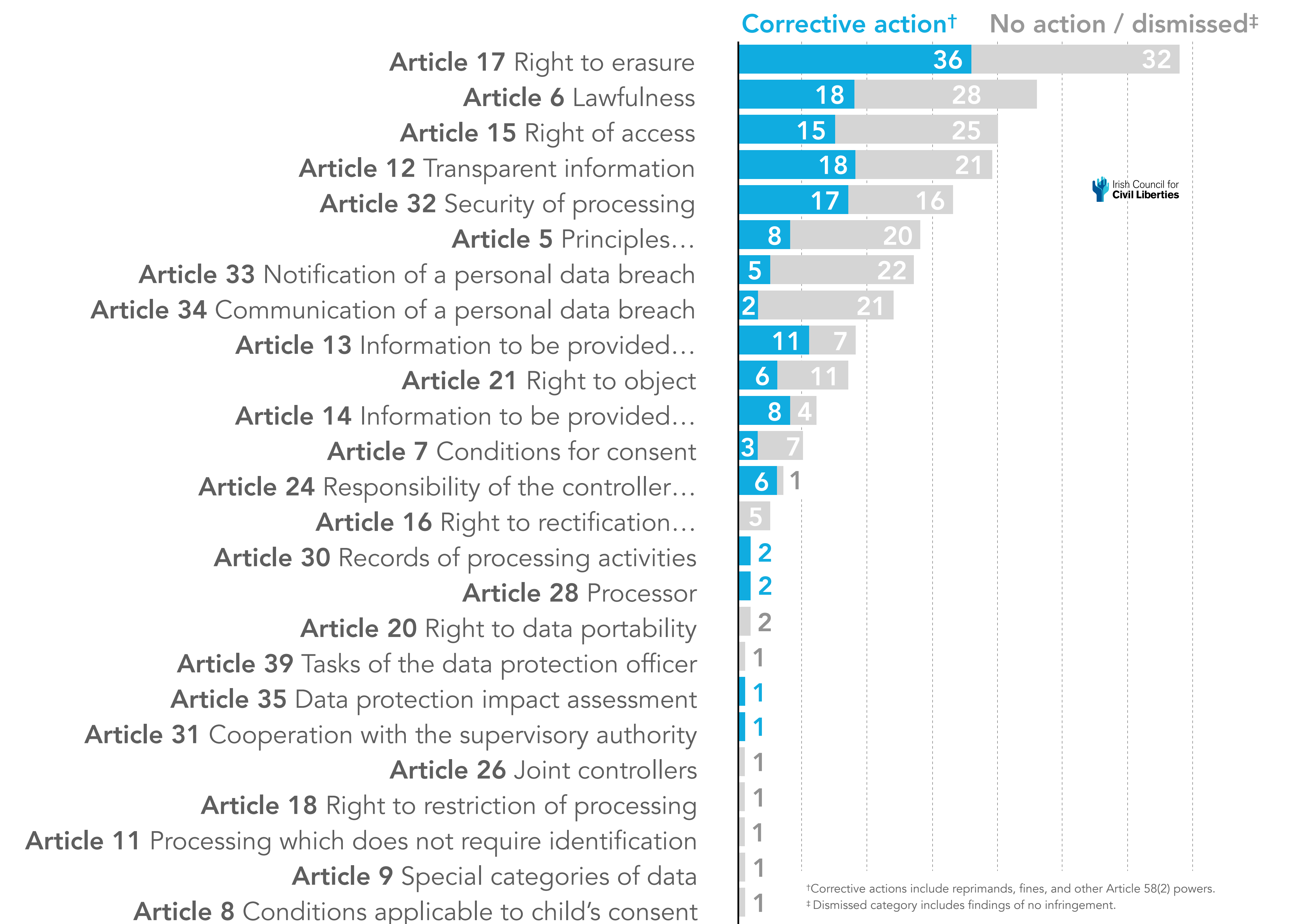
EDPB Article 60 decisions, 25 May 2018 - 21 July 2021



Note, several articles may feature in a single case.

Outcomes of final EU-wide decisions by GDPR Article

EDPB Article 60 decisions, 25 May 2018 - 21 July 2021



[†]Corrective actions include reprimands, fines, and other Article 58(2) powers.
[‡]Dismissed category includes findings of no infringement.

Note, several articles may feature in a single case.

GDPR's funding bump is fizzling out

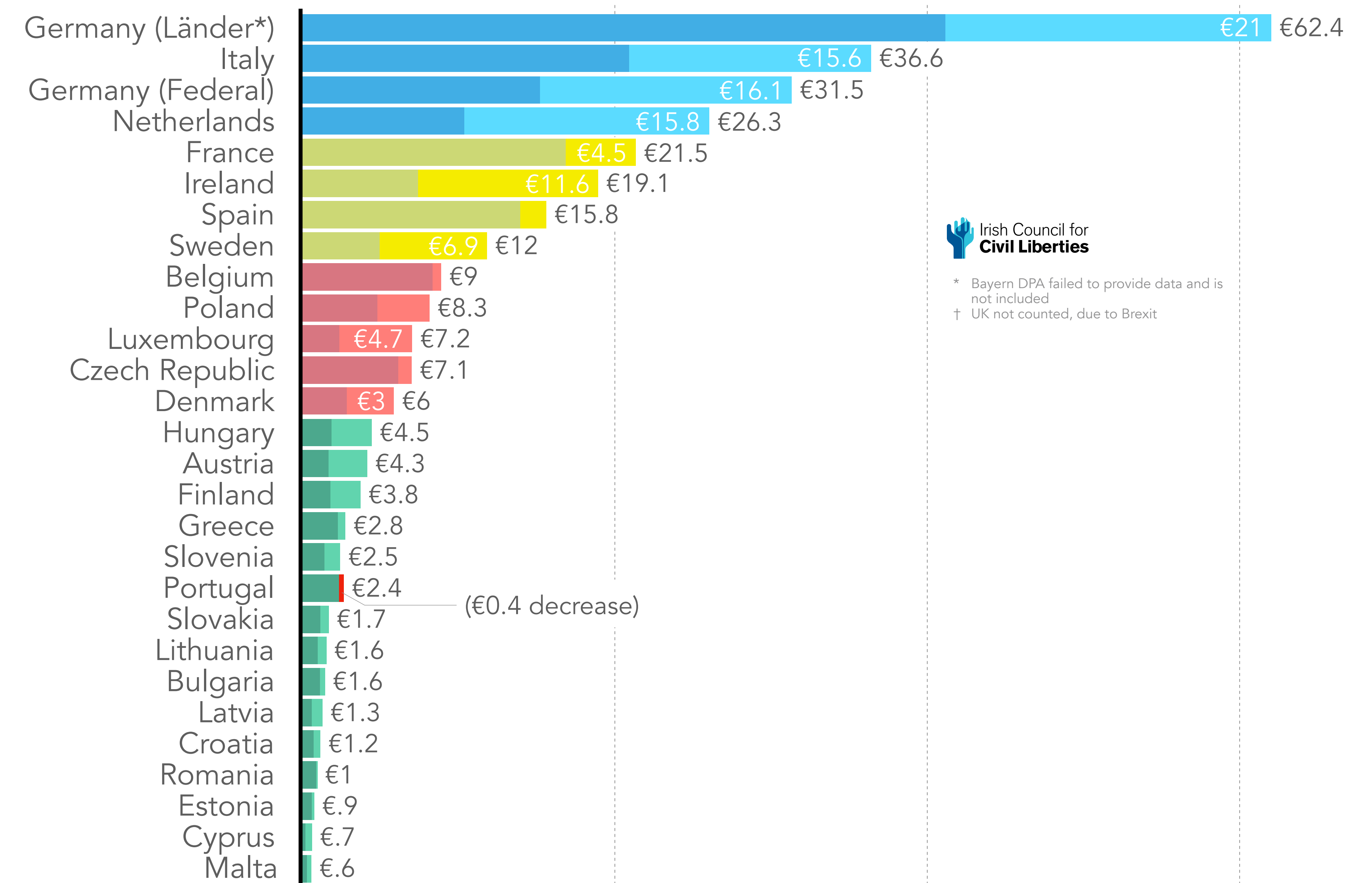
EU Governments invest in their DPAs, but this investment declines every year.

The findings:

- The combined budgets of EU DPAs (UK excluded) has **increased from €162 million in 2016 to €294.6 million in 2021**.
- Annual increases to DPA budgets **peaked in the build up to the GDPR in 2018**, but have **steadily declined every year since**.
- Germany's DPAs have a combined budget of €94.7 million. **Germany accounts for 32% of all EU DPA budgets**.
- **9 DPAs** have budgets of **less than €2 million per annum**.

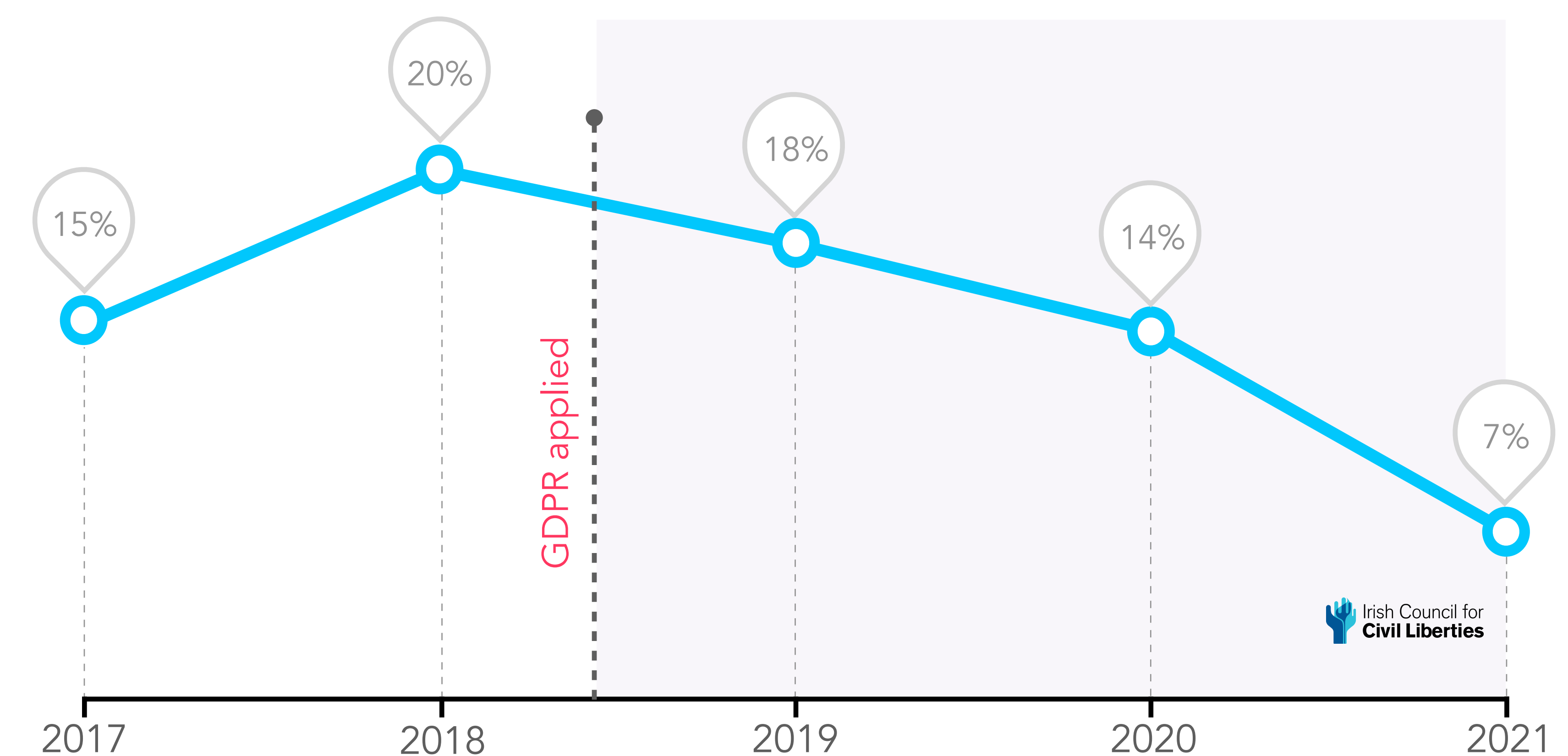
EU DPA budget changes from 2017-2021†

in millions of euro, increases shown in lighter colour, totals in dark text



Combined increases in all EU DPA budgets

% year over year increases (UK not counted)



Too few tech specialist staff to police tech

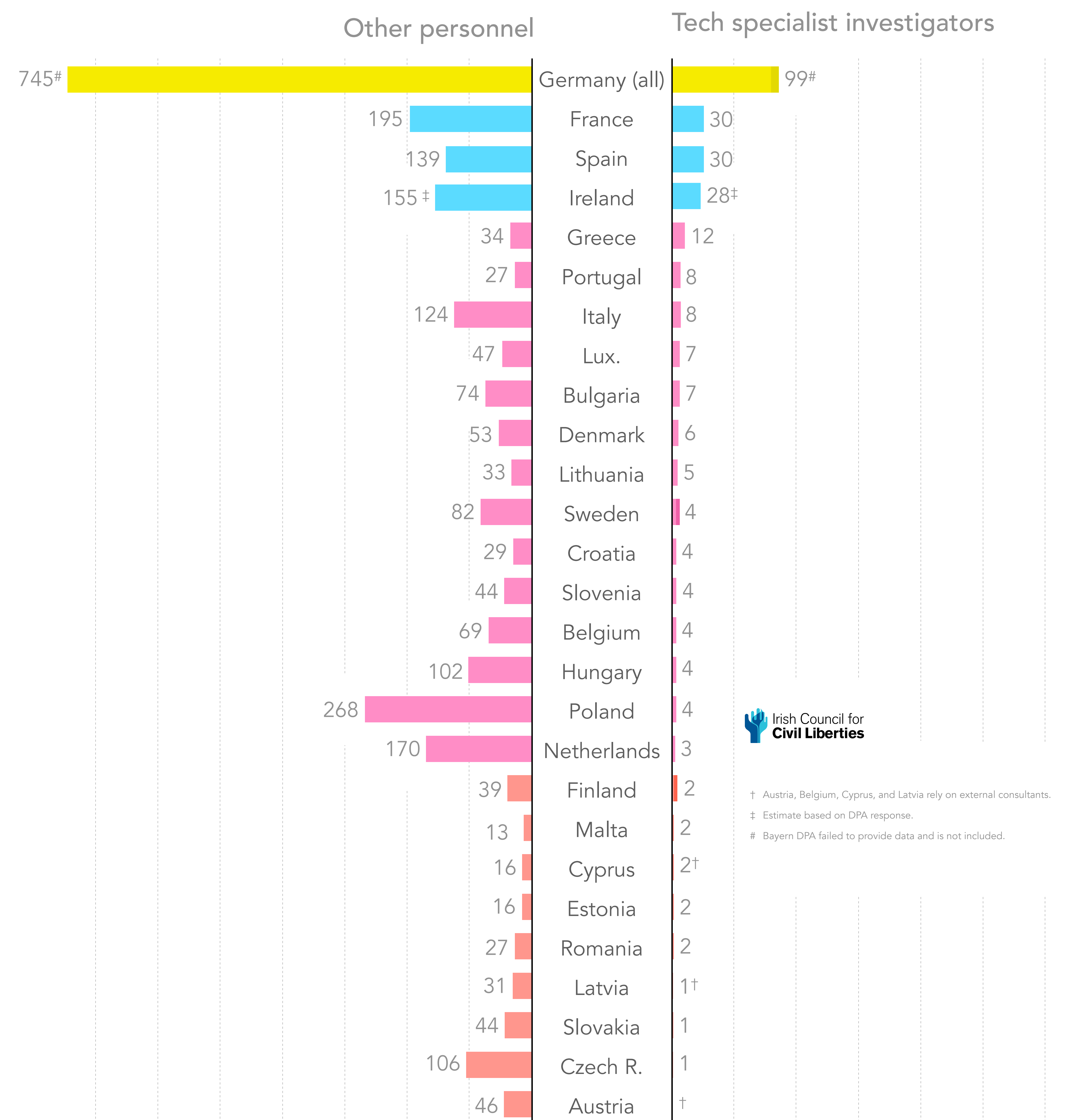
Europe's DPAs are not configured for the digital era, and continue to lack the capacity to investigate and understand what tech companies do with people's data.

The findings

- EU Member State DPAs claim a **combined total of 293 tech specialists**. This number does not include IT support staff.
- **Only 5 EU Member States** have **more than 10** tech specialists, but **more than half** (15) have **only 4 or fewer**.
- The **UK ICO** (not in chart because of Brexit) is the largest single DPA, but **only 13 people** (1.7% of its full time staff) are in its "cyber" investigations team.

Tech specialists at EU data protection authorities

full time equivalents, rounded (vacancies are not counted, but are shown in darker colour)



Recommendations

We repeat our recommendations of 2020, and welcome the establishment of the EDPB Support Pool of Experts³. In addition:

1. The **Irish Data Protection Commission (DPC) must be reformed and strengthened**. The recommendations of the Justice Committee of the Irish Parliament and Senate² should be urgently implemented. In particular:
 - The Irish Government should provide for an **independent review of how to strengthen and reform the DPC**. This is necessary to fulfil Ireland's duty of sincere cooperation under Article 4(3) of the Treaty on European Union (TEU), and to fulfil its duties under Article 52(4) of the GDPR.
 - The Irish Minister for Justice should use her power to appoint two **additional Data Protection Commissioners**.
 - The DPC must "move from emphasising guidance to **emphasising enforcement as a matter of urgency**".
2. The European Commission should use its power under Article 258 of the Treaty on the Functioning of the European Union to **launch an infringement procedure against Member States that jeopardise the protection of personal data**. Data protection is one of the Union's objectives. Jeopardising it is a failure to fulfil Member States' obligations under Article 4(3) of the TEU.
3. The European Commission must improve its **monitoring of the application of the GDPR**. It should request that the EDPB and DPAs publish **the following data each quarter** in order to enable it to perform its duty under Article 17 of the TEU:
 - Time (days) to progress each case from first complaint or proactive investigation to draft decision and then to final decision.
 - How many cases each DPA is the Lead Supervisory Authority (LSA) for. This should also specify the number of separate cases or complaints combined in each cases.
 - How many times each LSA used each investigative power provided in GDPR Article 58(1), in that quarter.
 - How many times each LSA used each sanctioning power provided in GDPR Article 58(2), in that quarter.Each of the above should include the types and scale of controllers concerned, and whether a case is domestic or cross-border. In exceptional cases where national law precludes case-level data, robust aggregated data may suffice.

Methodology and end notes

Methodology:

1. The number of cases referred to each DPA by other DPAs between May 2018 and May 2021 was obtained from the EU “Internal Market Information System” (IMI) using freedom of information requests. We rely on IMI “Article 56 assumed” figures for the number of complaints referred to LSAs.
2. This was charted to show the primary LSAs, and mapped using Eurostat/GISCO mapping data of the EEA, from which non-EEA members were then removed.
3. The number of draft and final decisions between May 2018 and May 2021 on cross-border cases for each LSA were obtained from the IMI using freedom of information requests.
4. The number of confirmed cases in May 2021 for which each DPA confirmed it is the LSA are available in the EDPB’s “Overview on resources made available by Member States to the Data Protection Authorities and on enforcement actions by the Data Protection Authorities”, Aug. 2021, p. 9.
5. The backlog in DPA draft decisions in cross-border cases was calculated by subtracting the number of draft decisions delivered by each DPA (see point 3) to May 2021 from the number of cases it has as LSA (see point 4) in May 2021. The percentage was calculated of the number of draft decisions each DPAs delivered as LSA as a percentage of that DPA’s cross-border cases.
6. Budget data for the Irish DPC and Spanish AEPD from 2000 to 2021 were found in both organisations’ annual reports and accounts over the period. Budgets and draft decisions delivered (point 3) for the Irish DPC and Spanish AEPD were charted.
7. Final cross-border decisions and the GDPR articles concerned in each case from 25 May 2018 to November 2020 were extracted from the EDPB [public registry](#) of final decisions, and for November 2020 to 21 July 2021 were determined by analysing every final decision submitted to the EDPB.
8. Decisions in cross-border cases were categorised by outcome: i. corrective action (covering compliance orders, administrative fines, and reprimands), ii. no corrective action, iii. dismissal or no infringement.
9. Outcomes in cross-border cases were charted by Member State concerned.
10. GDPR articles concerned in cross-border cases were charted. In addition, GDPR articles concerned were grouped and charted in four categories: data rights (articles 15-23), security (articles 25-36), transparency (articles 12-14), and lawfulness (articles 6-8).
11. Budgets for DPAs from 2016-2021 were provided by each DPA, or in their annual reports or EDPB publications (“Contribution to the evaluation of the GDPR”, Feb. 2020, pp. 28-9; and “Overview on resources...”, Aug. 2021, p. 4).
12. ICCL received information about the number of tech specialist staff and number of all personnel at each DPA from 27 EU Member State national DPAs and 15 Länder (German) DPAs. These figures were checked against other sources.
14. Tech specialist staff include policy, research, and certification roles focused on tech, but exclude technical support. This was charted to show the proportion of these personnel to other personnel in each DPA.

End notes:

1. “Telework in the EU before and after the COVID-19: where we were, where we head to”, European Commission Joint Research Centre, 2020, URL: https://ec.europa.eu/jrc/sites/default/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf
2. “Report on meeting on 27th April 2021 on the topic of GDPR”, Joint Committee on Justice, Tithe an Oireachtas, July 2021, URL: https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2021/2021-07-22_report-on-meeting-on-27th-april-2021-on-the-topic-of-gdpr_en.pdf
3. “EDPB Document on Terms of Reference of the EDPB Support Pool of Experts”, EDPB, 15 December 2020, URL: https://edpb.europa.eu/sites/default/files/files/file1/edpb_document_supportpoolofexpertstor_en.pdf

Acknowledgements and caveats

Irish Council for Civil Liberties:

ICCL has been at the forefront of every major rights advance in Irish society for over 40 years. We helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects' rights during dark times. ICCL is a membership organisation and is independent of government. More at [ICCL.ie](https://www.iccl.ie).

Acknowledgements:

Dr Johnny Ryan and Alan Toner produced this report.

We thank our colleagues at the EDPB and at DPAs across the European Economic Area, and at Noyb, for insight and data.

We also thank our colleagues at ICCL, particularly Sinead Nolan and Liam Herrick.

We thank Reset and Luminate for supporting ICCL's work on data and digital rights.

The EEA map on page 4 was created using boundary data that is copyright of EuroGeographics.

The cover photograph is by Karolina Grabowska.

Caveats:

This report excludes DPAs that supervise public sector data processing: the Agència Catalana de Protecció de Dades, the Agencia Vasca de Protecció de Datos, Der Bayerische Landesbeauftragte für den Datenschutz, Žurnalistų etikos inspektorius tarnyba, and the European Data Protection Supervisor.

The IMI system relies on self reporting by DPAs, and LSAs may combine several referred complaints in to a single case. There are discrepancies between different figures for the number of cases assigned to LSAs.

We rely on IMI "cases per LSA" figures for the number of LSA confirmed cases. While the IMI registry may include cases that are not Article 60 cases, it is lower than other figures reported by a DPA with access to IMI data on LSA case load.

We attempt to verify the number of tech specialist staff reported to us by DPAs, but cannot guarantee them. In cases of doubt, the resulting figure is a best estimate of the number of FTEs based on dialogue with the DPA.

The Bayern DPA declined to provide data and is not included.

Final cross-border decisions for Germany, the Netherlands, Spain, and Lithuania on page 7 may be undercounted, because national law may prevent some final decisions being registered.

Updated:

On 13 April 2022, amending list of lead authorities of major tech firms so that eBay is displayed in Germany, not Ireland.