

DUTCH AVIATION CASES

Just Culture in Action

14 September 2023 @ Vienna

Just Culture Conference

Katja van Bijsterveldt & Aco Verhaegh

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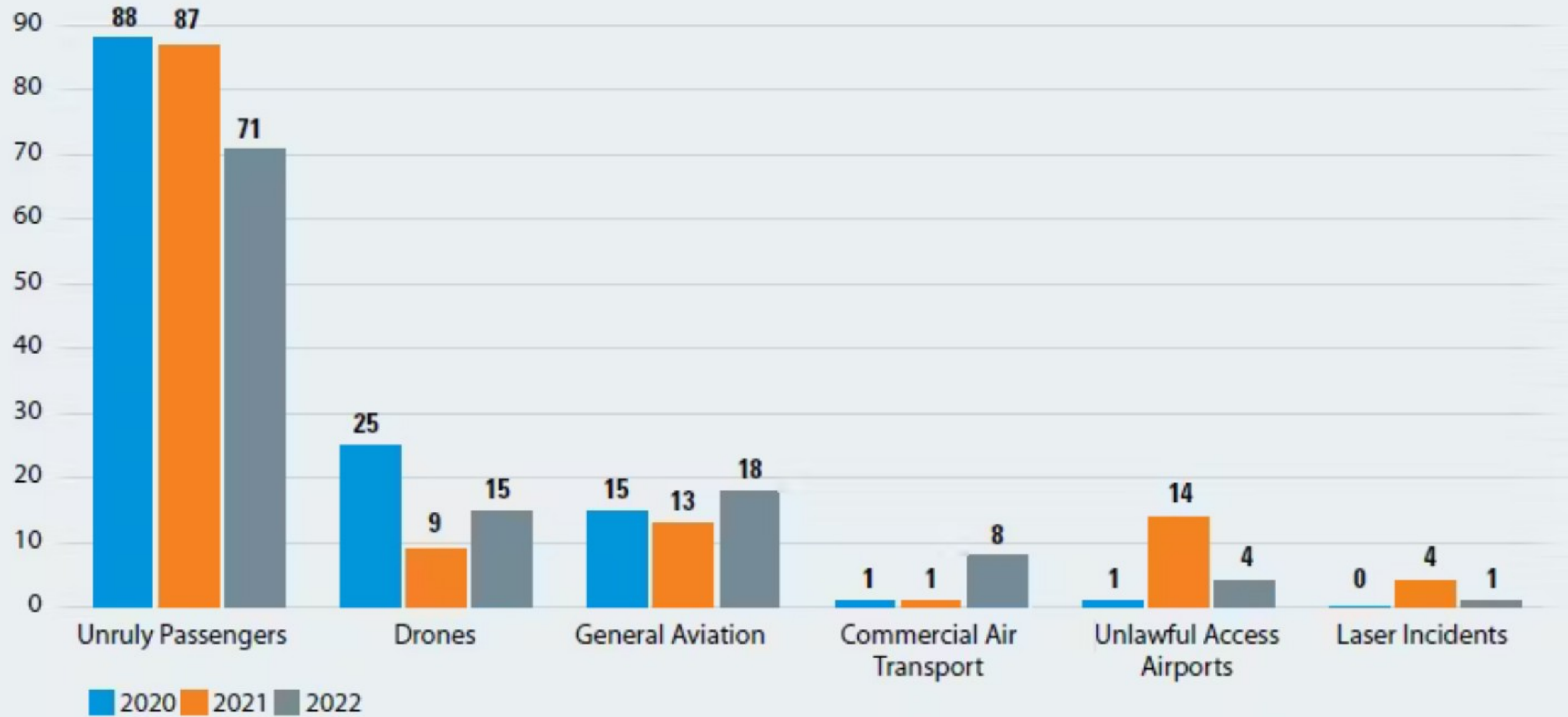
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Concentration Dutch aviation cases

- One Nationwide Aviation Prosecutor
- Specialized policy adviser and clerk
- Aviation police
- Promote legal certainty, also about Just Culture





Civil aviation cases registered by the PPS

What does the dictionary say?

Investigation /ɪnˌves.tɪˈgeɪ.ʃən/ |
the act or process of examining a crime,
problem, statement, etc. carefully,
especially to discover the truth

Prosecution /ˌprɒs.ɪˈkjuː.ʃən/
the act of officially accusing someone
of committing an illegal act, esp. by
bringing a case against that person in
a court of law

Important starting points

- Investigation ≠ prosecution!
- Truth about possible suspicion criminal offence'



RECONCILING CRIMINAL LAW ENFORCEMENT WITH JUST CULTURE

The Netherlands is often held up as a beacon of good practice when it comes to Just Culture in the judiciary. **Katja van Bijsterveldt** and **Aco Verhaegh** describe how Just Culture features in Dutch prosecution aviation cases.

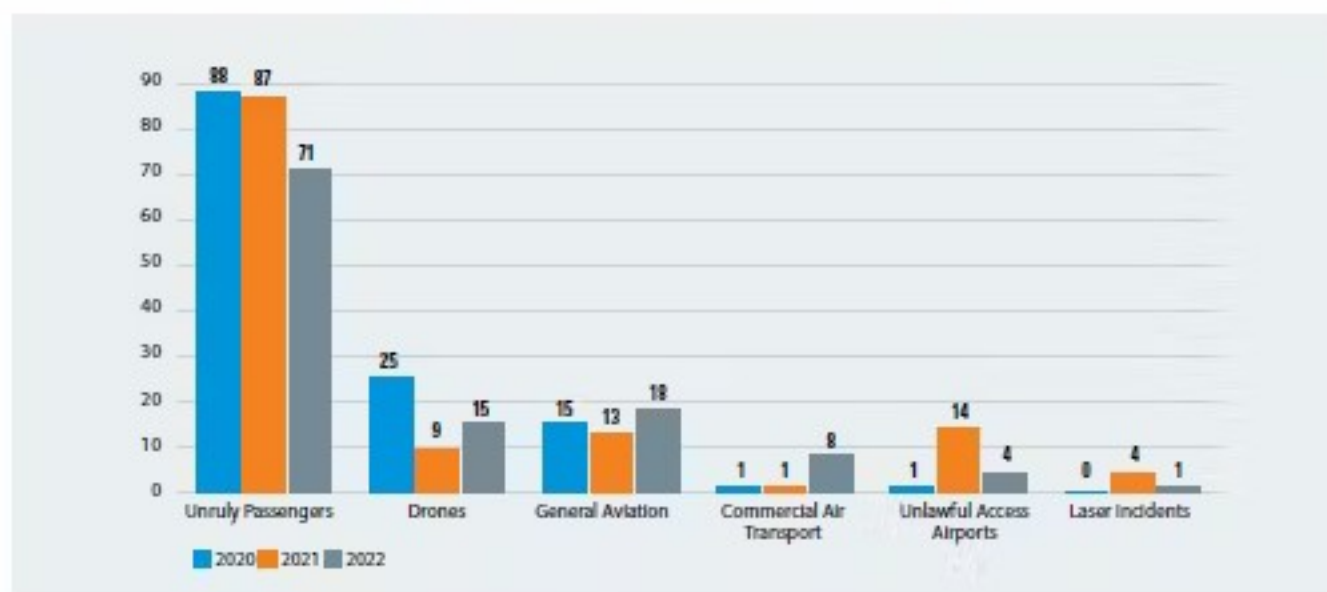
"Being a suspect is not compatible with Just Culture!" This remark came from a member of the audience following the presentation by the Dutch aviation police at a safety meeting at the airport in Breda in March 2023. This was not the first time we observed that the remit and actions of the police and the Public Prosecution Service (PPS) are unclear. We understand the confusion and aim to clarify. It was for this reason that we previously launched a roadshow at the 'Aviation safety network day', organised by the Ministry of Infrastructure and Water Management in September 2022.

During the meeting in Breda, our presentation elaborated on a presentation by the aviation police. In the process, the tension between criminal investigation and Just Culture was discussed extensively. After this, understanding seemed to improve. In this article, we hope to explain further how Just Culture features in Dutch prosecution aviation cases.

Criminal Investigation and Prosecution in The Netherlands

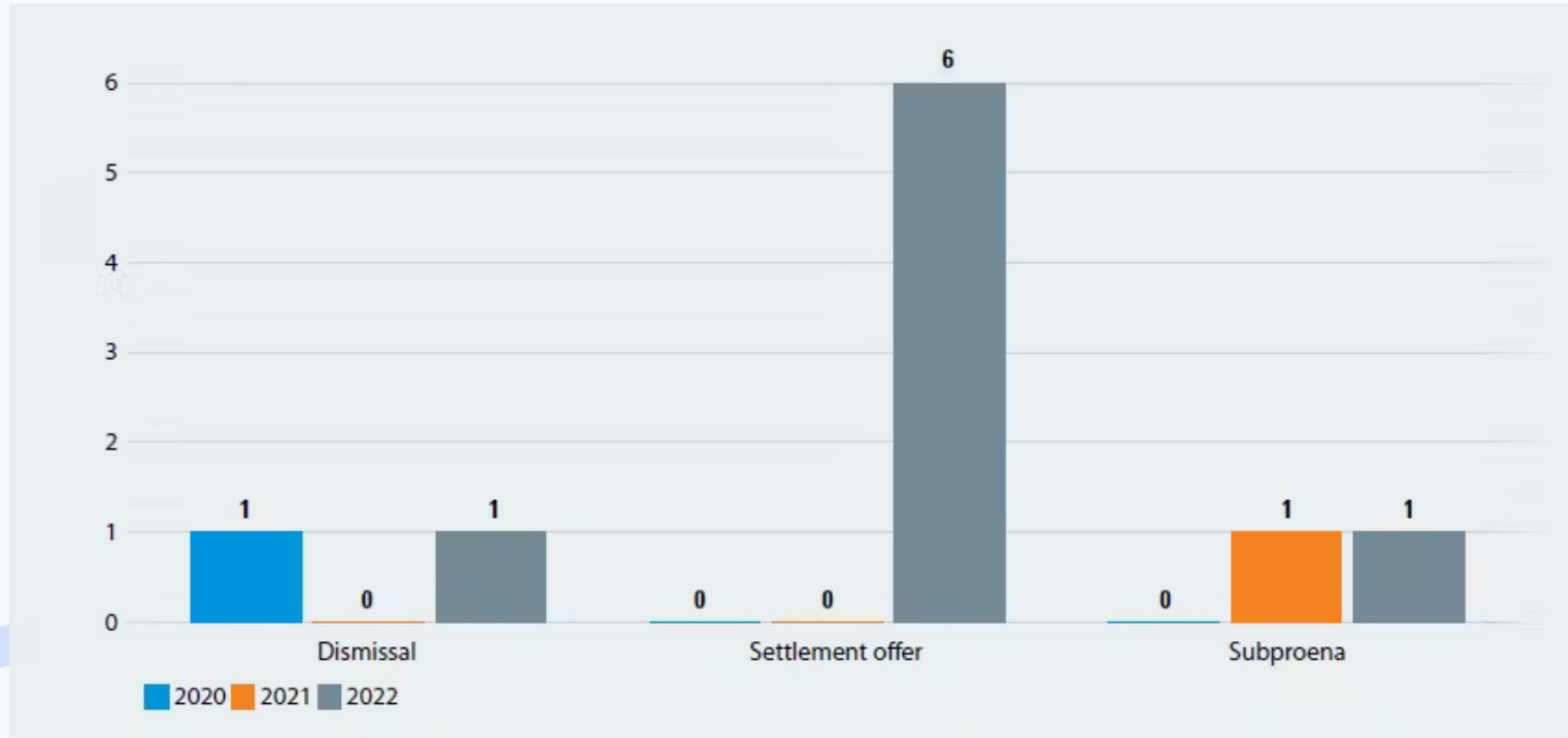
The PPS covers all Dutch criminal investigations relating to civil aviation with one national coordinating aviation public prosecutor. As well as investigations concerning manned aviation, which we address in this article, these include investigations into drone violations, laser incidents, unlawful access to airports, and unruly passengers (see Figure 1). The aviation prosecutor is involved from the outset and may order the aviation police to start a criminal investigation. These experienced police officers know about aviation legislation and regulations, have personal experience flying aircraft, and are trained to investigate aviation accidents. They follow the same training programme as that of the Dutch Safety Board investigators.

Figure 1: General overview of civil aviation cases registered by the PPS

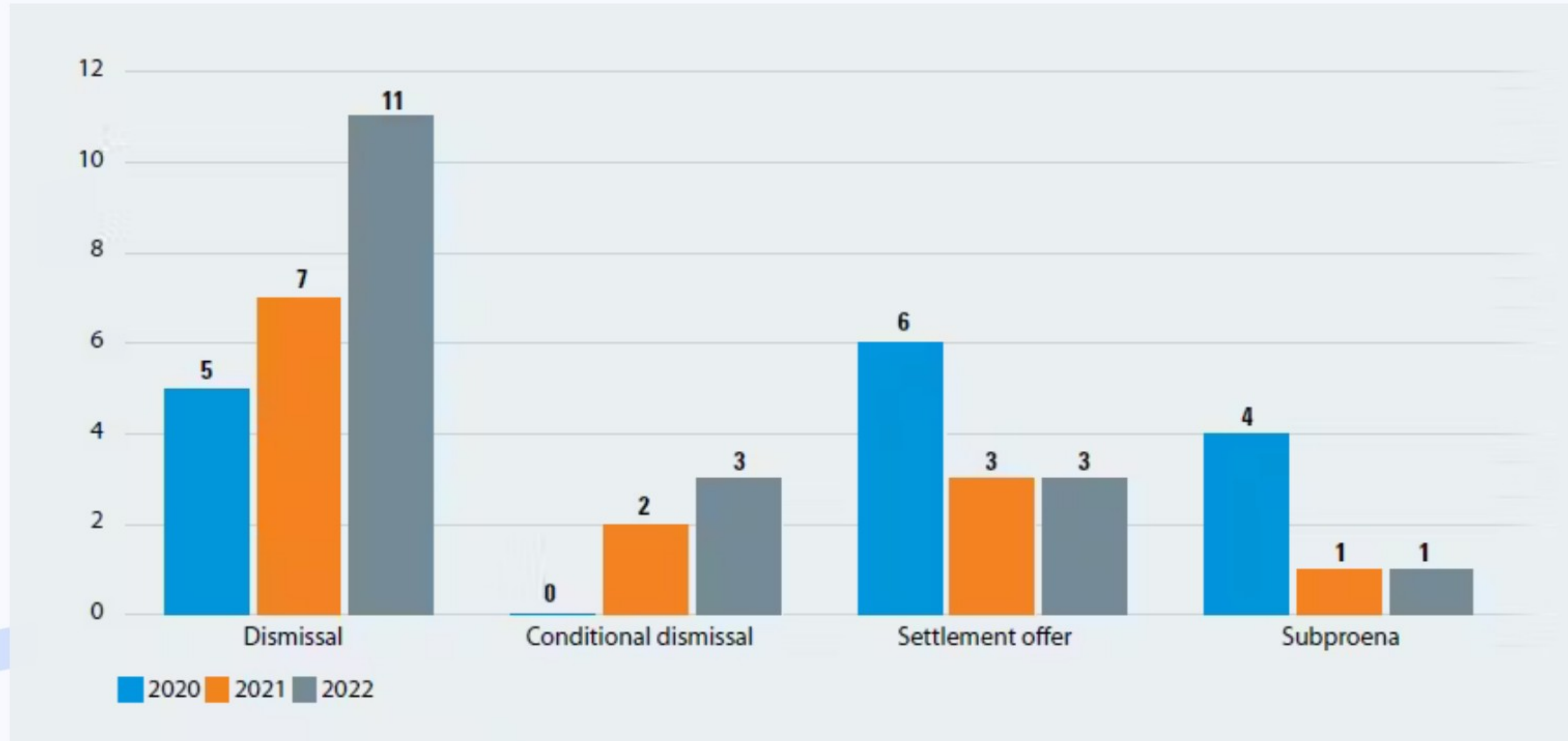


A few more features

- Basis for investigation = suspicion of criminal offence
- Triggers for investigation
- Public interest and Just Culture
- Different approach CAT and GA



Major CAT case outcomes



GA case outcomes

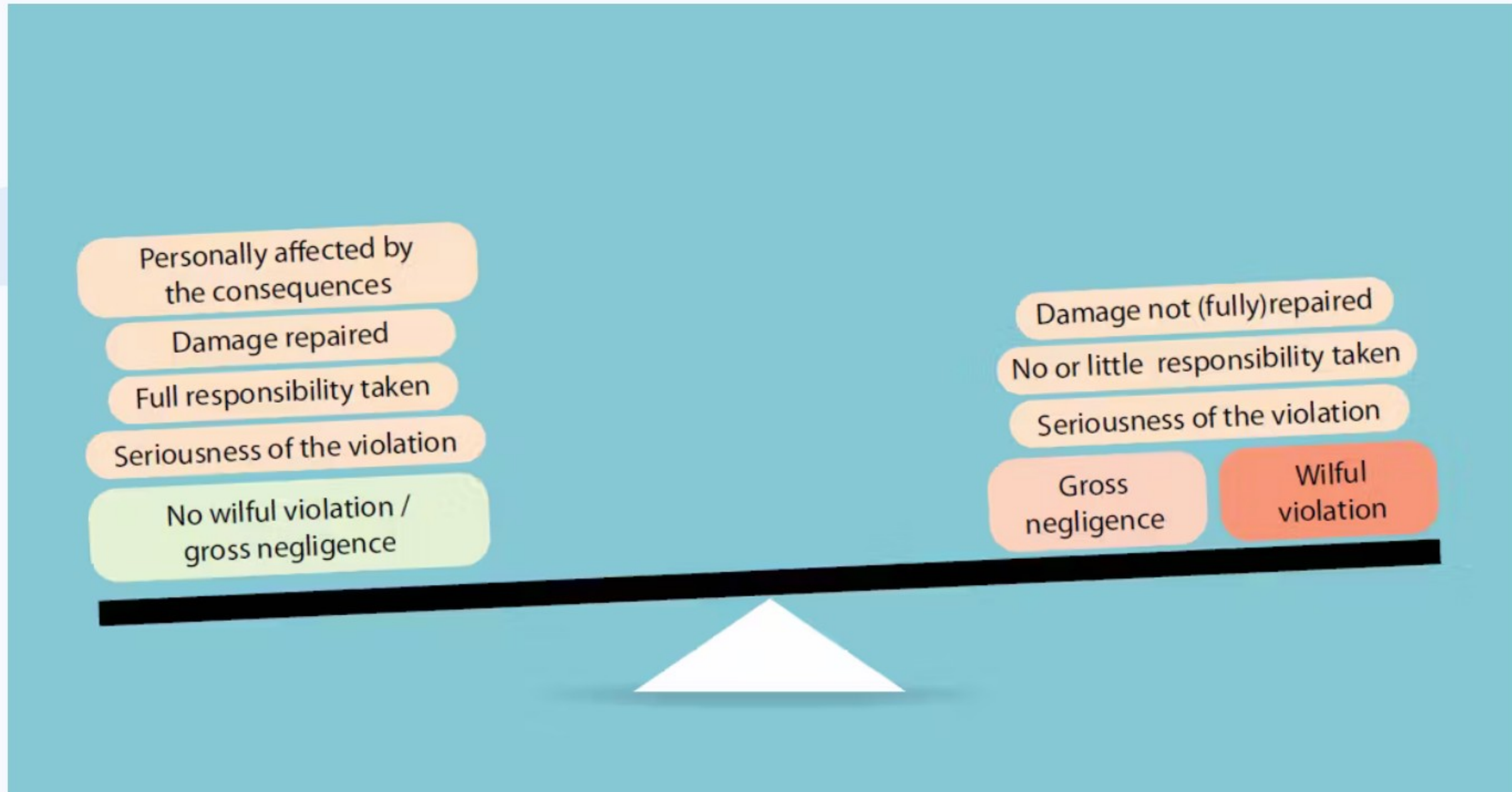
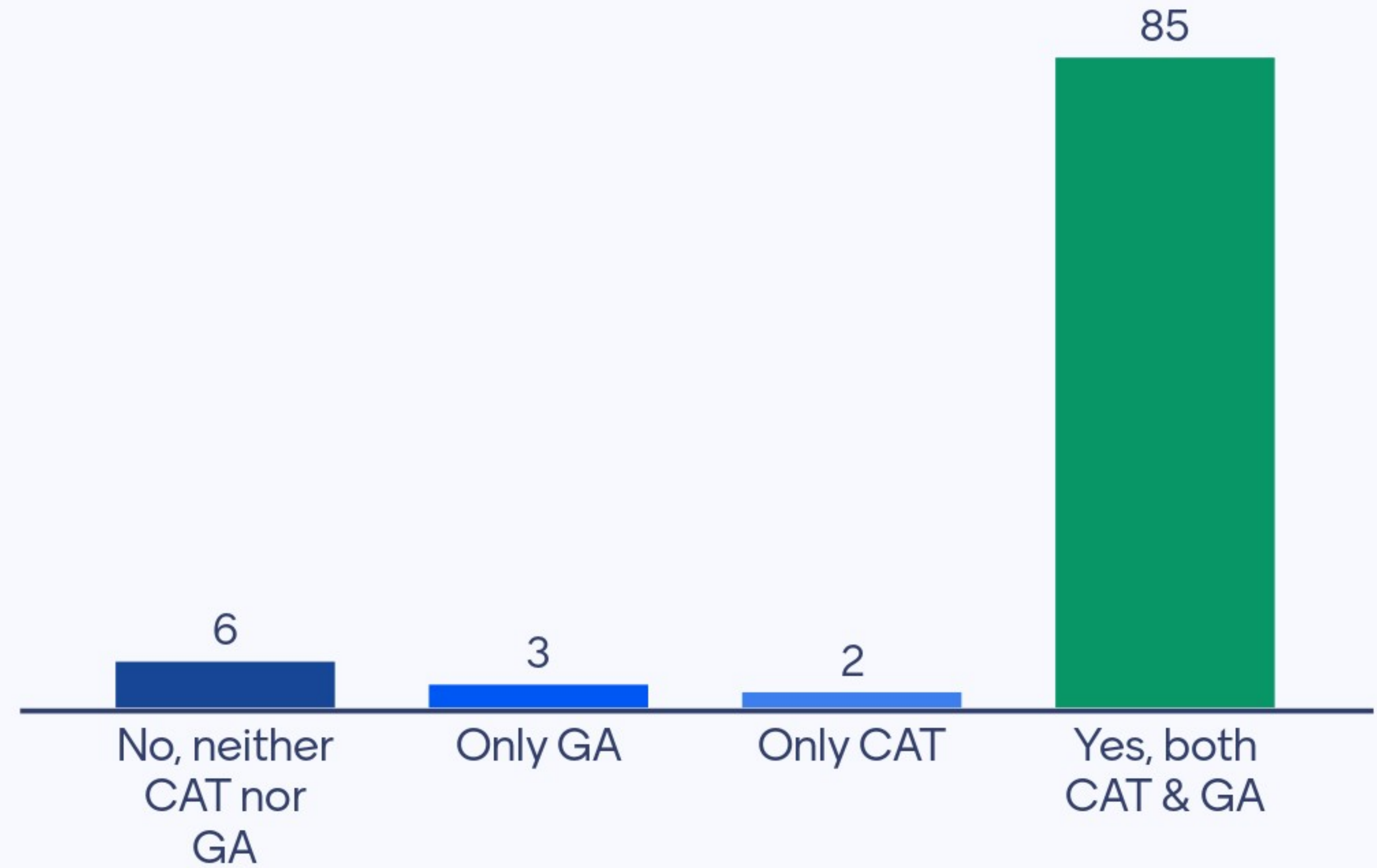


Illustration balancing factors in civil aviation cases

Do you agree with this possible role for the prosecutor?



independent

analysts

aviation

analus

evaluator

last resort

mediation

education

question

justice

just

x

professional

educator

analyst

knowledge

accountability

investigation

balance

impartial

balanc

fallback if others fail

yes

independence

investigators

proportional

safety enhancer

victim at forefront

obtain learnings

prosecutors

independant

investigate

investigator

prosecutor

mediator



Focus on the practice

- Explain by the help of 5 cases
- Critical remark
- Way forward



The whole picture

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Gaining context

- Points of view in the investigations
- Hearing with suspect
- General conversations, e.g. JCTF
Eurocontrol and gatekeeper Dutch
CAA plus aviation representatives

This is an English informal translation of the original document prepared by the Eurocontrol Just Culture Task Force.

Instruction with regard to criminal investigation and prosecution of civil aviation occurrences

Legal character: Instructions within the meaning of Article 130.6 of the Judiciary Organisation Act

From: Board of Prosecutors General

To: Heads of the departments of the Public Prosecution Service

Registration number: 2020A001

Date of entry into force: 1.3.20

Publication in Government Gazette: For the record

Lapsed: Instruction with regard to criminal investigation and prosecution in case of reporting of civil aviation occurrences (2006A015)

Relevant Public Prosecutor's Office policy rules: Directive on criminal proceedings in aviation legislation (2018R011)

Legal provisions: Articles 1.1, 7.1, and 11.25 of the Aviation Act

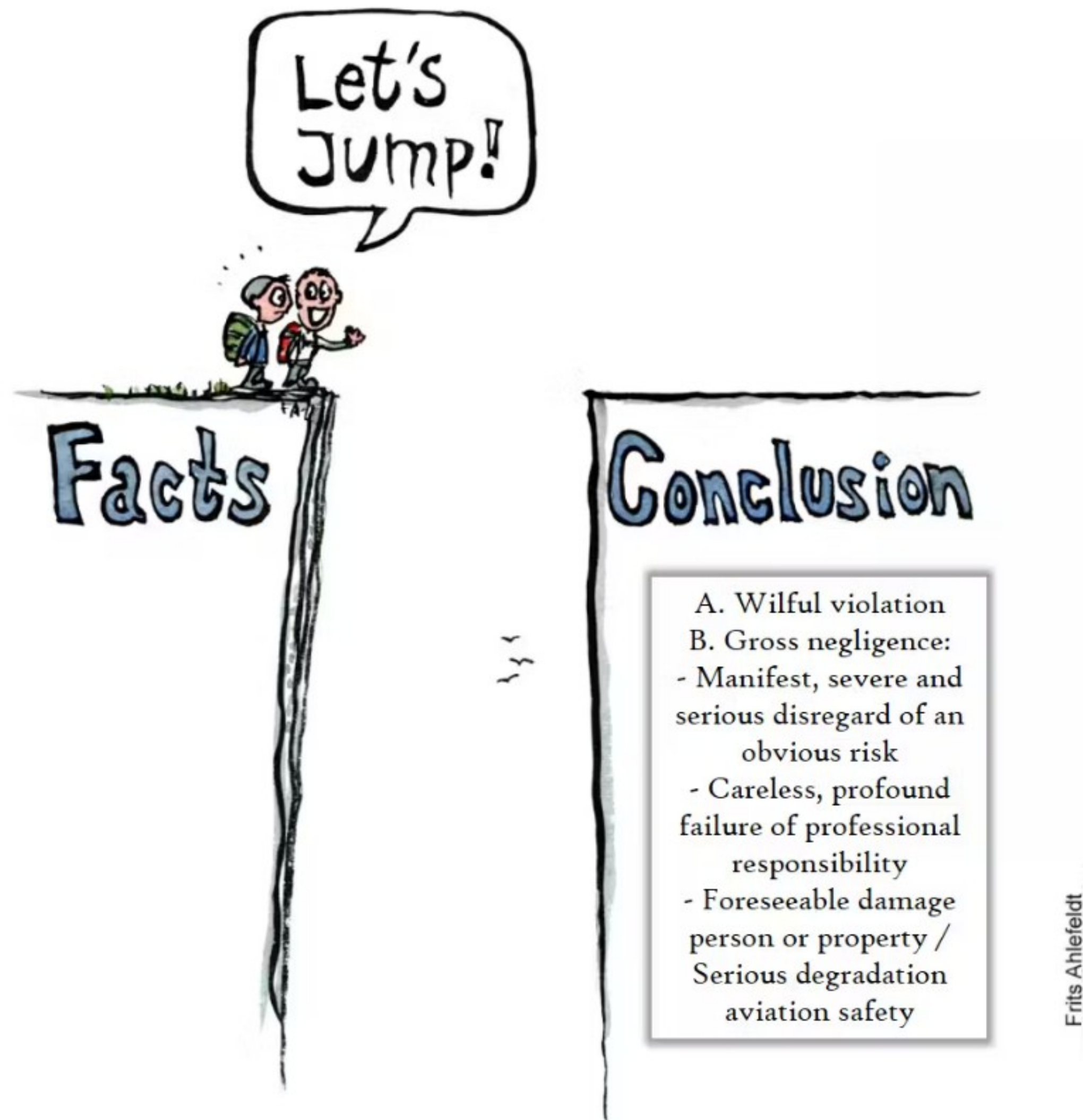
Annex(es): –

SUMMARY

This instruction contains rules for the criminal investigation and prosecution of criminal offences in the event of a civil aviation occurrence.

General conversations with Dutch CAA

- Occurrence reports
- Gatekeeper CAA
- Representatives aviation sector
- Understanding criteria criminal law
- Understanding safety management system



Development tool

- Avoid jumping to conclusions
- Measure scales based on the thresholds
- Wilful violations
- Elements of gross negligence

Weighing suspicion of wilful misconduct or gross negligence

This scheme provides the user with a tool to assess whether there is a 'suspicion of wilful misconduct or gross negligence' based on an occurrence report. If the Aviation Occurrence Analysis Bureau of the CAA (ABL) determines such a suspicion on the basis of this assessment and, if desired, after obtaining advice within the CAA, the ABL will forward the report to the PPS. This is in accordance with the Instruction with regard to criminal investigation and prosecution of civil aviation occurrences. The PPS can then carry out further investigations in order to assess whether there is actually wilful misconduct or gross negligence in a criminal sense.

A. Wilful misconduct

1.

B. Gross Negligence

2. Manifest, severe, serious disregard of an obvious risk

3. Profound failure of professional responsibility to take such care as is evidently required in the circumstances

4. Foreseeable damage to a person or property

5. Seriously compromised level of aviation safety

Did the person concerned intentionally break a rule?

Score based on the available information. Enter score 0 if there is not enough information to make an estimate.

No	Accepted possibility				Deliberately
0	1	2	3	4	5

Yes, clarify?

Was there an obvious (safety) risk?

No	Unintended			Intended, severe	
0	1	2	3	4	5

Yes, clarify?

Has the risk been neglected by the person concerned?

What standard can be expected from the person concerned, based on information about education, training and experience? A **lower**, **higher** or **normal** standard?

Lower
Higher
Normal

Has the person concerned fallen short of this standard?

No	Somehow				Serious
0	1	2	3	4	5

Yes, clarify?

For a student pilot there are less high requirements, for an experienced pilot or instructor higher ones. If no information, assume normal standard.

Consider the substitution test and the routine tests (person/organization).

Did the occurrence cause any damage?

No	Somehow				Absolutely
0	1	2	3	4	5

Yes, clarify?

Was this damage foreseeable for the person concerned?

Has aviation safety been seriously affected?

No	Somehow				Absolutely
0	1	2	3	4	5

Yes, clarify?

It is not only a concrete violation of aviation safety, but also an attack in the abstract (think of flying without valid proof of airworthiness or a serious airspace violation).

Just Culture flowchart used to start the conversation

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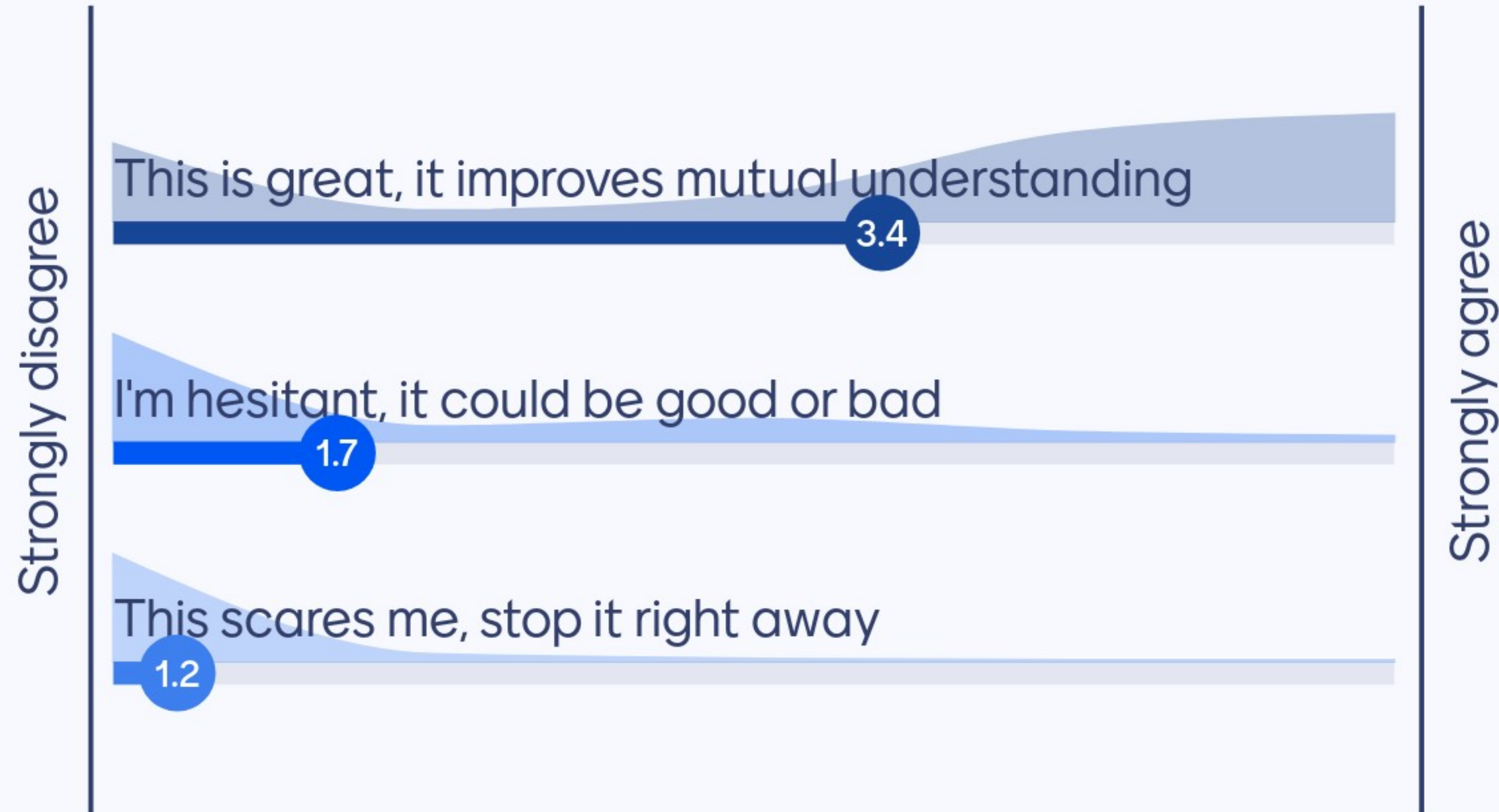
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What do you think about this practice?

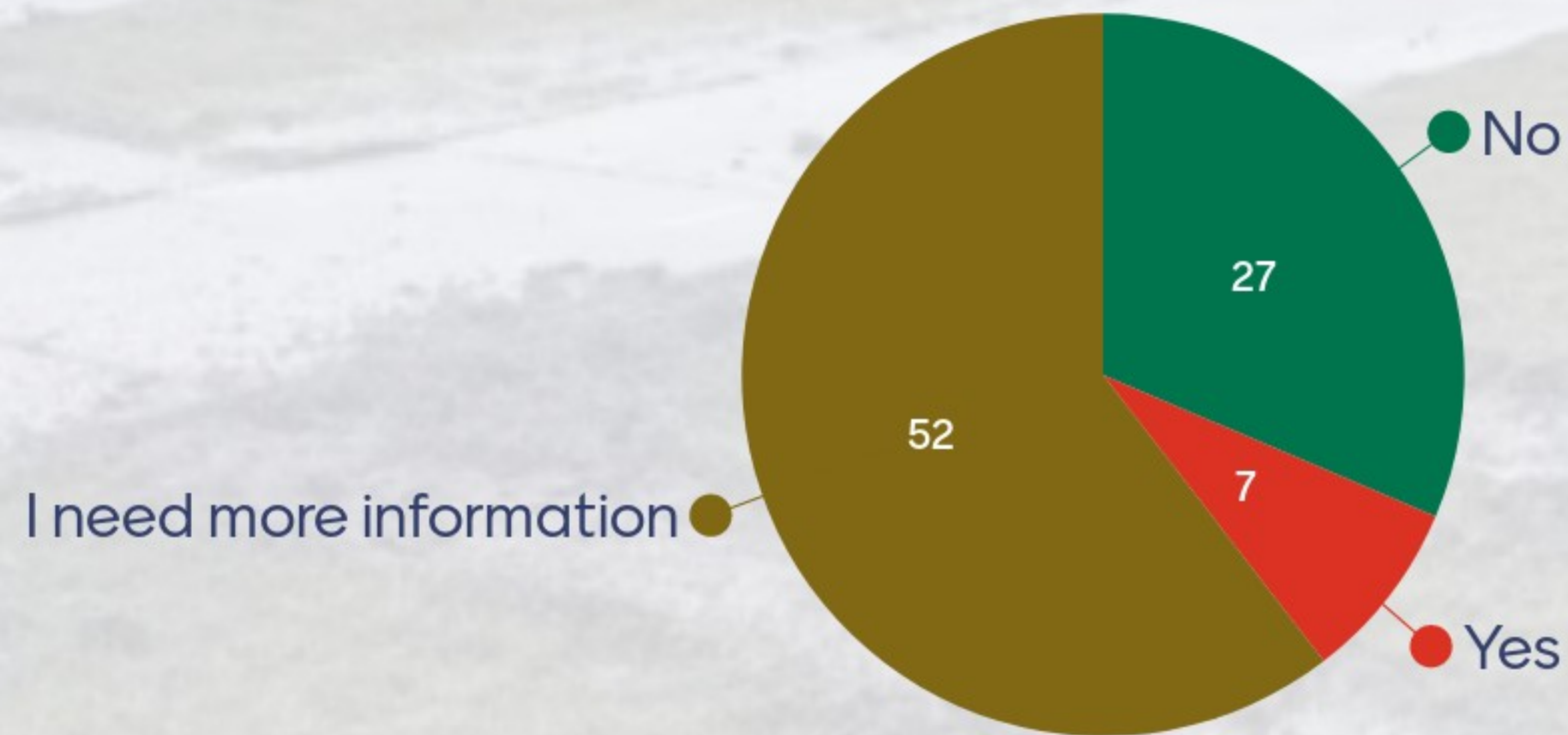


CAT case 1: touchdown before threshold

- Landing in strong winds foreign airline
- Runway lights were hit
- Runway closed to repair the lights and clear debris
- Aircraft slightly damaged
- Aviation police notified



CAT case 1: Would you start a criminal investigation?



CAT case 1: Decision

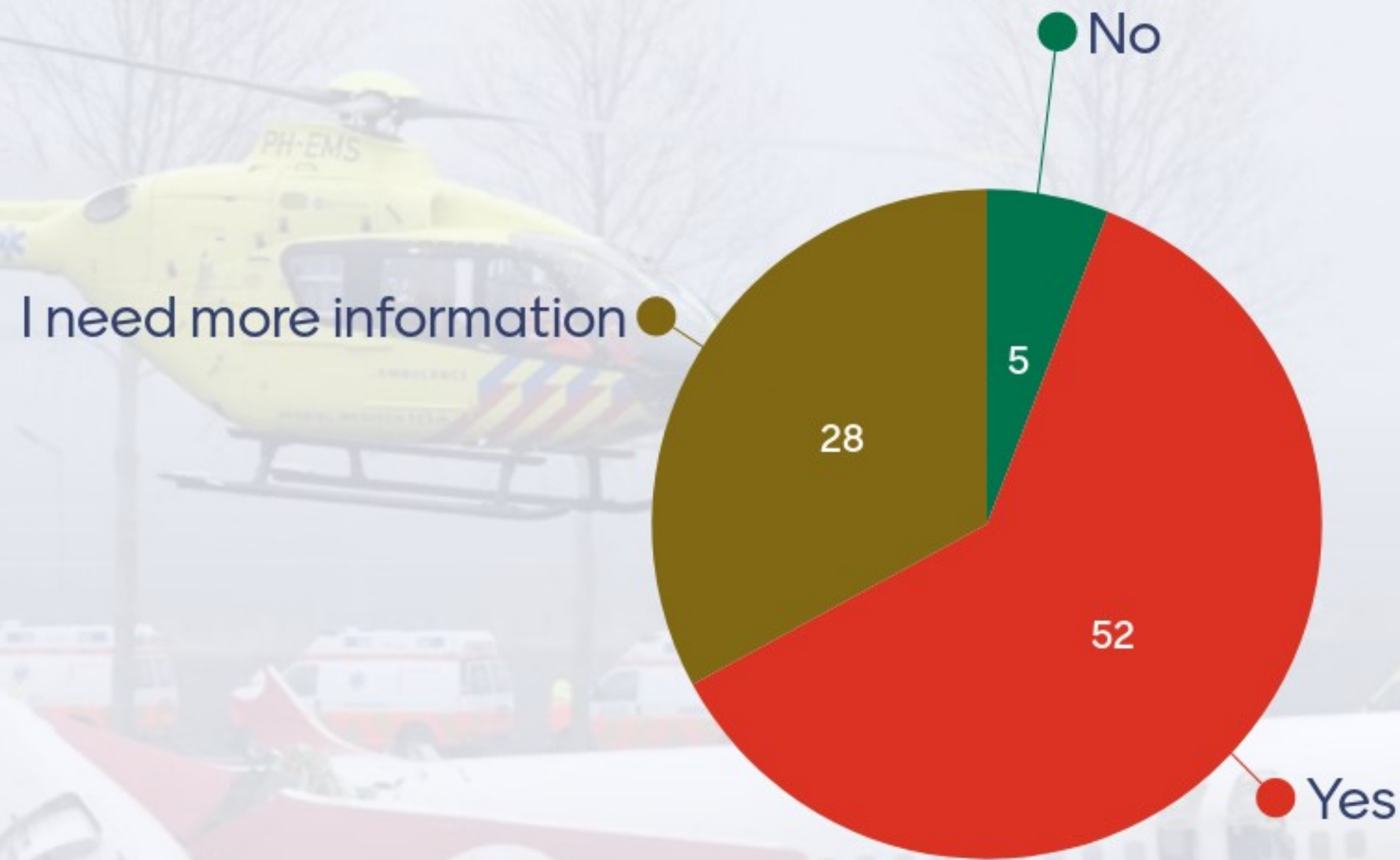
- No criminal investigation
- Nobody got hurt, only damage property
- Dutch Safety Board investigates
- Good impression airline SMS



CAT case 2: crash with fatalities

- Plane fell out of the sky
- 9 people lost their lives

CAT case 2: Would you start a criminal investigation?



CAT case 2: Decision

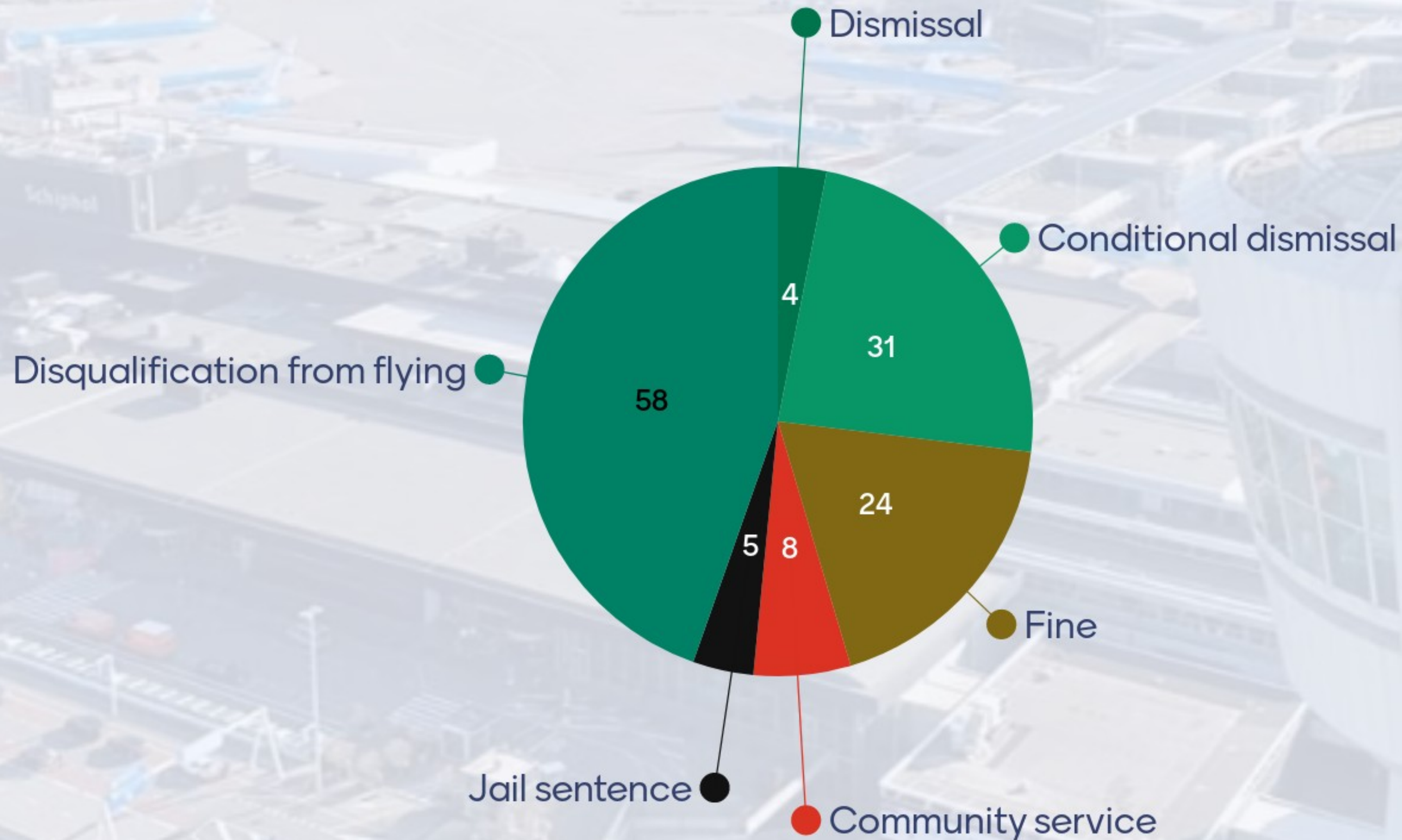
- Criminal investigation
- Ultimately leading to a dismissal
- Complaint surviving relatives dismissed by the court

CAT case 3: captain refusing alcohol test

- Captain foreign airline
- Positive result preliminary test
- No cooperation definitive test (breath analysis/blood test)

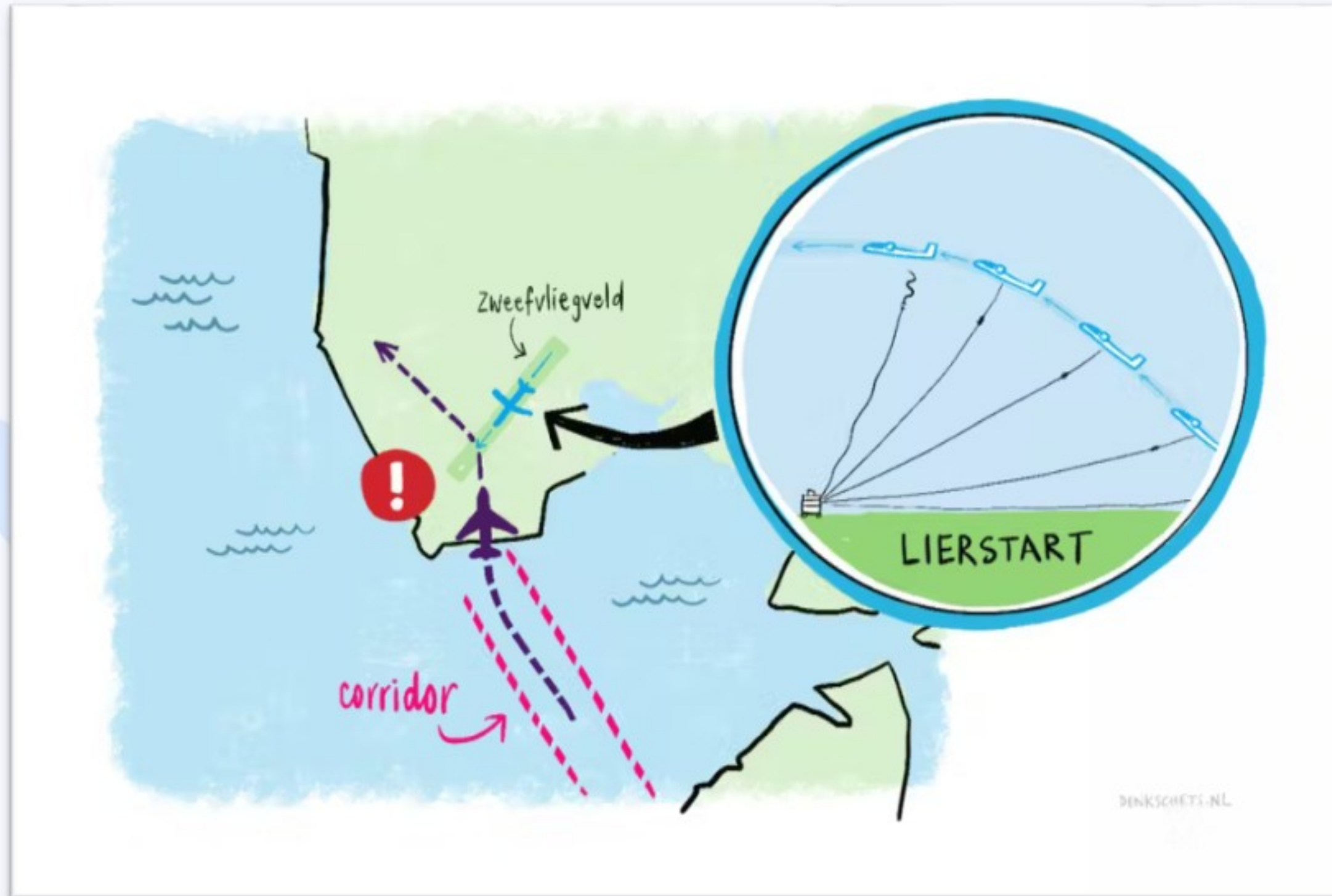


CAT case 3: What would your decision be?



CAT case 3: Decision

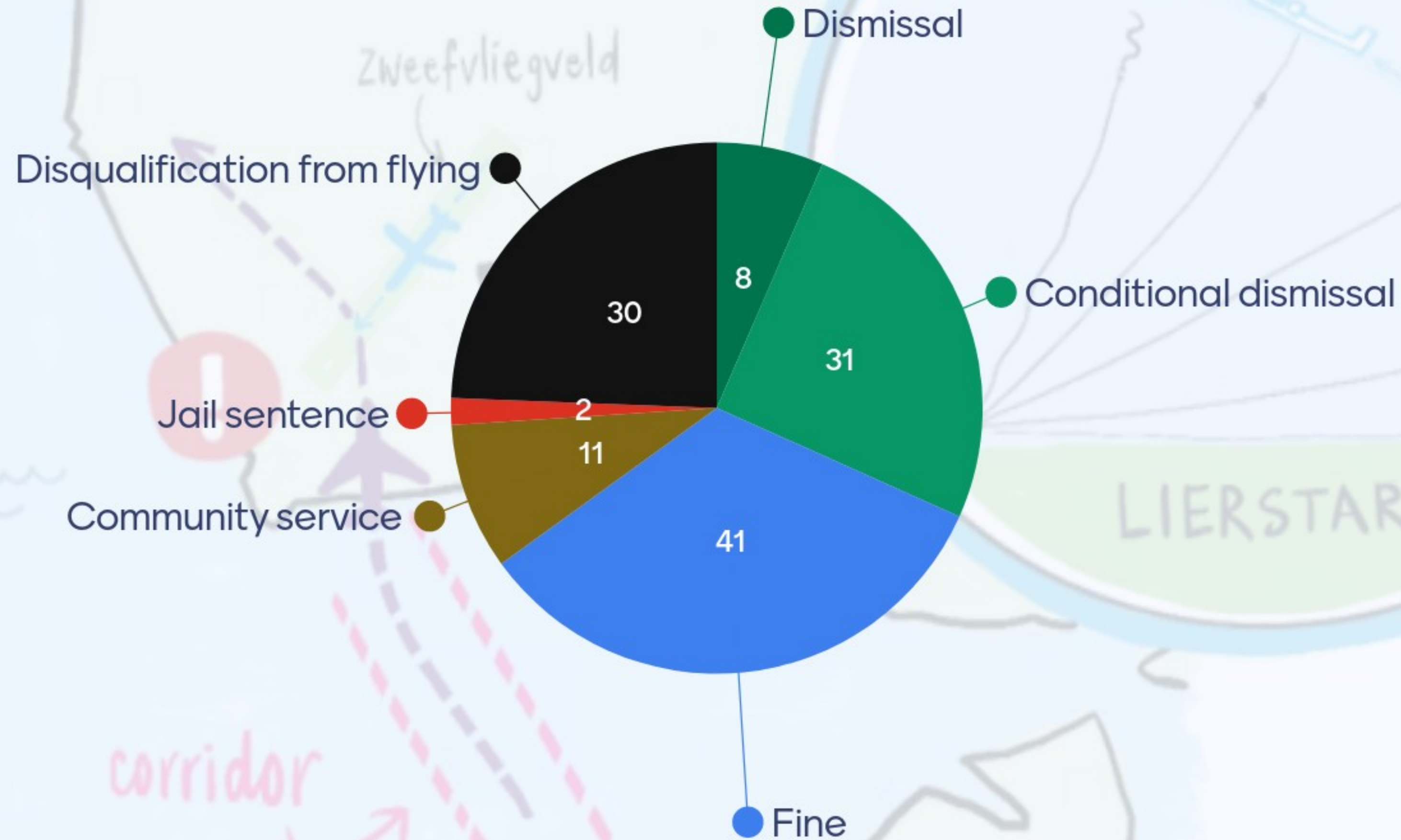
- Subpoena
- Demand PPS: € 7.000 and 59 weeks disqualification of flying
- Verdict: € 5000 and 59 weeks disqualification of flying, of which 28 weeks conditional



GA case 1: near-miss glider

- Pilot overflew a gliding airfield
- 1338-1371 feet / 408-418 meters
- Glider was winched up, AIP warning
- At 425-450 meters, view of the horizon
- According to glider pilot and passenger, plane was heading straight for them.
- Horizontal distance 75-100 meters.
- Sharp left turn, pilot motor plane reacted to TCAS
- Response pilot: I did nothing wrong, mainly referred to others

GA case 1: What would your decision be?



GA case 1: Decision

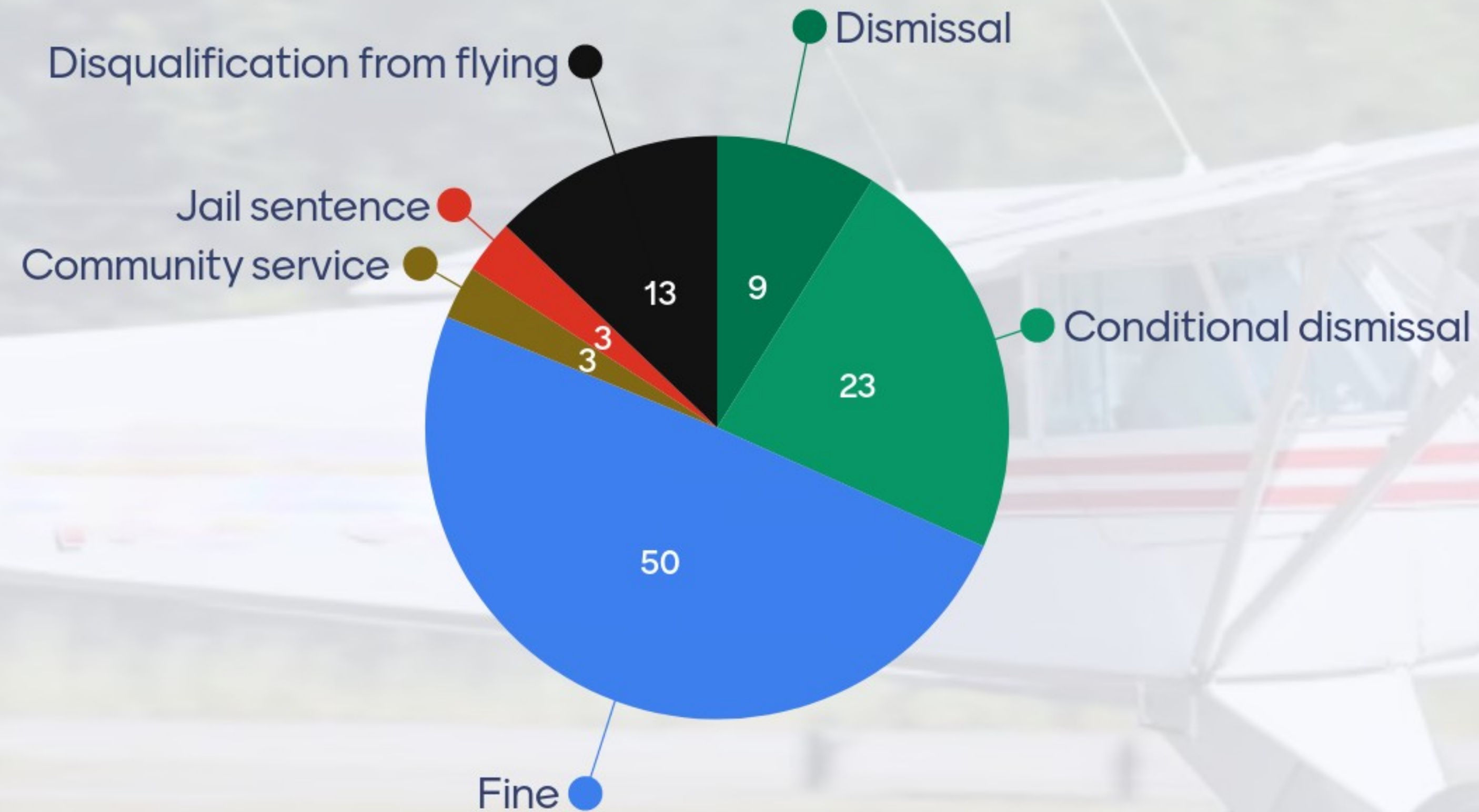
- Sufficient evidence SERA.3205
- Sentencing directive: subpoena, demand disqualification
- Deviation because of experience pilot, no record
- Settlement offer € 1000 to uphold the standard
- Offer accepted by the pilot



GA case 2: Expired certificate of airworthiness

- Expired at April 24
- 3 flights (go/return) from April 25 - May 5
- New certificate on May 6
- Pilot in command didn't want to make a statement
- Final invitation to PPS hearing was accepted
- Explanation given

GA case 2: What would your decision be?



GA case 2: Decision

- Understandable explanation
- Conditional dismissal: giving a presentation at flying club
- On his request we gave a presentation as well

The Global Voice of Pilots
IFALPA

POSITION PAPER
23POS11
18 April 2023

Use of Flight Recorders

BACKGROUND
IFALPA acknowledges the contribution of Flight Recorders to accident and serious incident investigation, conducted by the relevant State Investigation Authorities in accordance with ICAO Annex 13. These investigations have formed the foundation of the current high level of aviation safety.

Annex 13, para. 5.12 provisions concerning the protection of accident and incident investigation records, which state as follows:

*5.12 The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, **unless** the competent authority designated by that State determines, in accordance with national laws and subject to Appendix 2 and 5.12.5, that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations:*

- a) cockpit voice recordings and airborne image recordings and any transcripts from such recordings; and*
- b) records in the custody or control of the accident investigation authority*

The sub-paragraph then goes on listing these records.

POSITION
Whilst IFALPA supports the intention of the above paragraph, the Federation believes that the qualifying text starting with "unless" should be removed. There can be no circumstances in which onboard recordings are made available for purposes other than accident or incident investigation. Furthermore, the records should be protected with national laws.

Troubling statement

- Abolishing the balance test is not helping Just Culture
- Can make society suspicious
- Perhaps also prosecutors and judges
- Illusion of safety/protection?

Let's keep talking!

- We should talk more about the right balance
- Talk about possible or real occurrences and judgements
- Get more prosecutors and judges on board

Our next step: aviation expertise centre

- Januari 2024: 40 years after the first appointed aviation prosecutor
- Storing knowledge and experiences for our successors
- Website with database of our decisions, also in English.

Ask me anything

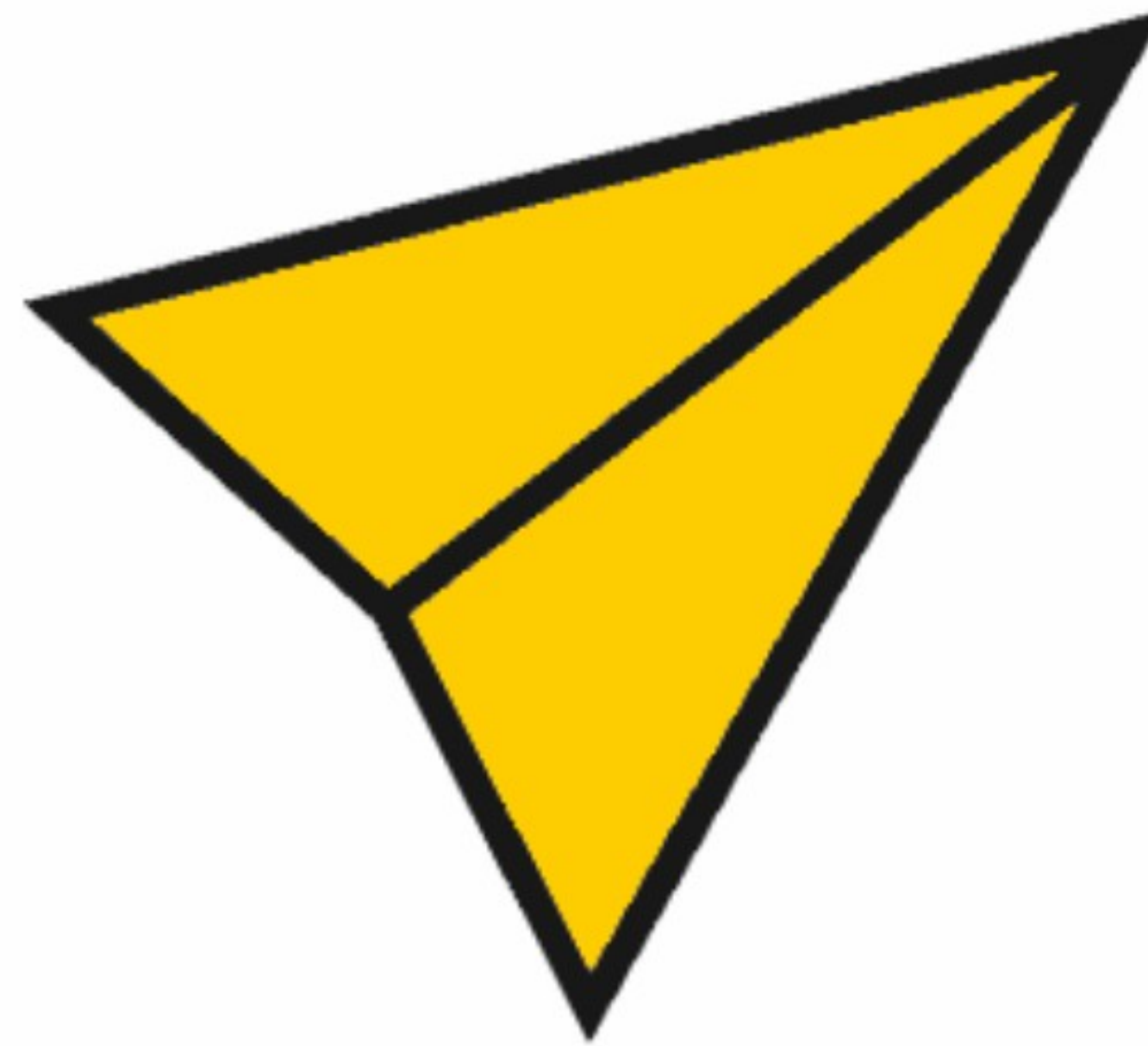
2 questions
0 upvotes

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Let's keep talking: aviation@om.nl