Summary

Improving access to the Court
Evaluation of the increment of the small claims limit for civil commercial cases at the Dutch Courts in 2011

This report discusses a research study, evaluating a measure introduced in 2011 that targets the handling of civil commercial cases in the Dutch Court system. In July 2011, the small claims limit for civil commercial cases in the Dutch court system was raised from € 5,000 to € 25,000. Before July 2011, commercial cases with a financial value of >€ 5,000 to ≤€ 25,000 were handled in the first instance by the civil sections of courts. In that setting, parties were obliged to hire a lawyer. Since 1 July 2011, these cases have been placed under the jurisdiction of 'kanton' judges,[139] who handle the smaller cases. This marked a change in the parties' obligations, the procedural rules, and the section of the court that handles the cases. These changes include:

- Parties are no longer obliged to hire a lawyer. They can choose any type of representative (for instance: a bailiff, their legal expenses insurance company, or a relative), or go to court without any kind of representative.
- Cases are no longer handled by a judge from the civil section of the court. The cases are now handled by the 'kanton' section of the courts. Judges in these sections are usually more senior, are believed to be more practical, and their cases take less time. Small claims are handled at more locations.
- Defending parties no longer have to pay a court fee.
- In the old situation, court cases would start with an exchange of written statements by claimants and defendants. In the new situation, the writ still has to be issued in writing, but defendants can respond to the claim with an oral statement, presented at an administrative hearing.
- The civil court sections used a master calendar (procedural decisions are made by one judge for all cases, while other judges handle the contentious decisions), while many small claims judges have individual calendars (both procedural decisions and contentious decisions are made by the same judge).

The evaluation of this measure focused on its consequences for access to the courts, and on the (perceived) quality of services of legal representatives in the old and the new situation. These focusses follow the main issues raised when the Dutch parliament decided on the measure. It should be noted that the original goal of the measure – directed towards a more flexible Court organization and the introduction of a multi-track case system – did not survive the debate in parliament. It leaves us with an ambiguous goal to evaluate: creating better access to justice. This 'goal' is 'second best'; it was not a main issue in the original advice that led to the measure; and it is questionable in the light of other measures taken around the same time (higher court fees, limiting subsidized legal aid) whether a genuine ambition to improve access to justice really existed. The explanatory memorandum accompanying the bill stated that raising the small claims limit would increase access to the courts,

[139] The 'kantonrechter' is a senior judge, historically based on the model of the 'Juge de la Paix' in French Law. In the Dutch system, both kantonrechters and judges at the civil sections of the courts are professional judges, employed for life. In recent years, the formerly independent kanton courts were integrated in the general jurisdiction first instance courts, and half of the locations of the more dispersed system of kanton courts have been closed. The trend is towards a fully integrated civil court section, with minor differences between kantonrechters and other judges that handle civil commercial cases.

but did not include a clear 'policy theory' on how this would be established. On the other hand, the memorandum stated that the measure was not expected to lead to more cases being brought before the court.

The research method

The design for this evaluation is quasi-experimental, with measurements in the old situation (before the increment of the small claims limit) and the new situation (after the increment). The measurement includes:

- the (development of the) number of civil commercial cases brought before the Court;
- the way the cases are handled (percentage of default judgments, amicable settlements, cases with hearings, witnesses, expert reviews, et cetera);
- peer review of the services of lawyers and other representatives;
- surveys among claimants and defendants in court cases; topics include costs, satisfaction with the representative and procedural justice.

Most of these measures only target cases in the € 5,000-€ 25,000 segment. The development of the number of cases was monitored in other segments as well. Measurements regarding the old situation focus on cases terminated in 2010 and court hearings that took place in 2011. Measurements regarding the new situation mainly involve cases handled in 2014.

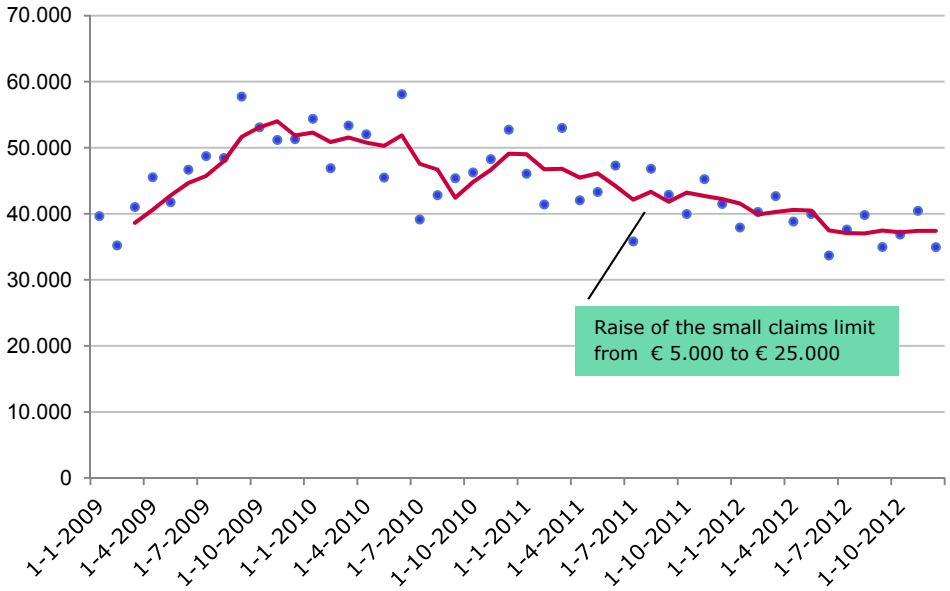
Access to justice

Regarding the effect of the measure on access to justice, one would expect an impact on the behavior of (potential) claimants as well as defendants. Claimants in these cases are mostly legal entities such as enterprises. At least one third to one half of the claims concern unpaid bills and debts; the claimants need a judgment to be able to collect the debt. Many of these cases pass through court undefended (about 50% of the cases in the € 5,000-€ 25,000 segment). The other half of the cases involve a broad variety of civil disputes, including tort cases, contracts, intellectual property, et cetera.

The annual number of new cases in the € 5,000-€ 25,000 segment (approx. 5% of all commercial cases) has grown substantially after the measure, whereas the general trend in commercial cases (the other 95%) was downwards. The study points out that not all of this growth can be attributed to the cases that, in the old situation, would not have been brought before a judge, and that not all of the growth can be attributed to the measure that was evaluated in the study. Firstly, part of the growth is explained by migration of cases between financial segments. In the old situation, there was an annual number of around 6,500 small claims with an exact value of € 5,000. After the measure, there were hardly any cases left with an exact value of € 5,000. The explanation for this phenomenon is that in the old situation, some parties reduced their claims to € 5,000 to ensure that their case would be handled as a small claim. Bailiffs, for instance, would be allowed to handle the court case themselves, without having to hire a lawyer. After the measure, the same cases will be brought before the court with an indicated financial value of over € 5,000. Secondly, some of the developments in the number of court cases could be attributed to competing policy measures taken around the time the small claims limit was raised. One measure was identified that has an impact synchronous to the measure evaluated. This involves a reduction of court fees in the € 5,000-€ 25,000 segment (while court fees were raised for the majority of cases). The reduction took place on the same day as the measure evaluated, which makes it impossible

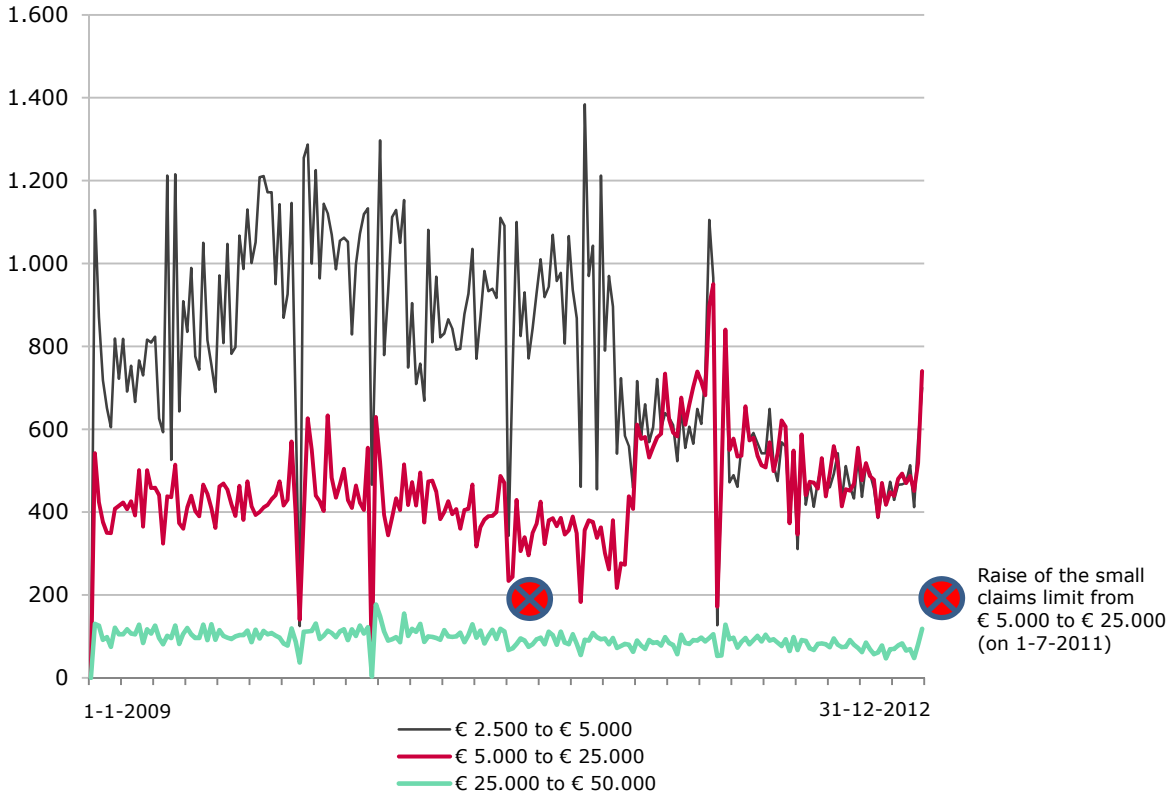
to separate the relative impact of each of the measures. The study shows, however, that claimants report a reduction of total procedural costs of € 1,500 (on average). The highest possible reduction in court fees is in terms of hundreds of euros. So it is safe to assume that raising the small claims limit has had the bigger impact on the costs (and access). The adjustment of court fees amplifies the effect of the measure.
Figure e1 shows how the call on judges in commercial cases developed in the period between 2009 and 2012. The overall number of cases started to drop at the end of 2009. Figure e2 shows the weekly number of incoming cases in the >€ 5,000-€ 25,000 segment, and the case segments just up to € 5,000 and above € 25,000. It visualizes the big increase of cases in the € 5,000-€ 25,000 segment, as well as the migration effect of the measure on the up-to-€ 5,000 segment.
Claimants profit from no longer being obliged to hire a lawyer, but some other thresholds were lifted for defendants as well. They no longer have to pay court fees, and they are allowed to present their defense orally. They may also profit from the more dispersed system of kanton courts (cases are handled by the court nearest to the address of the defendant). In the old situation, 62% of the cases remained undefended. This percentage dropped to 47% after the change of regime. This indicates that the old rules were a more-or-less serious threshold for defending parties, withholding them to exercise their right to be heard by the judge. On the other hand, in the new situation, defendants hardly face any formal thresholds, but still almost half of them do not defend themselves. A survey among these parties clarifies this: these defendants are certain they will lose the case and/or will not be able to pay. Thus, it is not costs that prevent them from defending themselves, it is a lack of (expected) returns. A comparative analysis of proceedings under the old and new rule suggests that part of the cases that are now formally registered as defended cases (because the defendant presents an oral statement at an administrative hearing), are actually summarily defended. A survey among defending parties shows that there is confusion among these parties regarding the administrative hearing; over 40% believed that they were obliged to attend the administrative hearing (not true) and over 40% expected their case to be judged during this hearing (not true). This makes it plausible that the rise of the percentage of defended cases can, to some extent, be attributed to defendants not fully understanding the proceedings. In the old situation, they would have had to consult a lawyer and would have been informed about the proceedings. Some of them might even be advised not to defend themselves. In the new situation, this 'filtering' by lawyers no longer takes place.

Figure e1 Monthly number of incoming commercial cases (blue dots) in the first instance, and three-month average (line)



This figure includes all commercial cases, regardless of the financial value of the case. The figure does not include rent and labor cases, or preliminary relief proceedings ('kort geding').

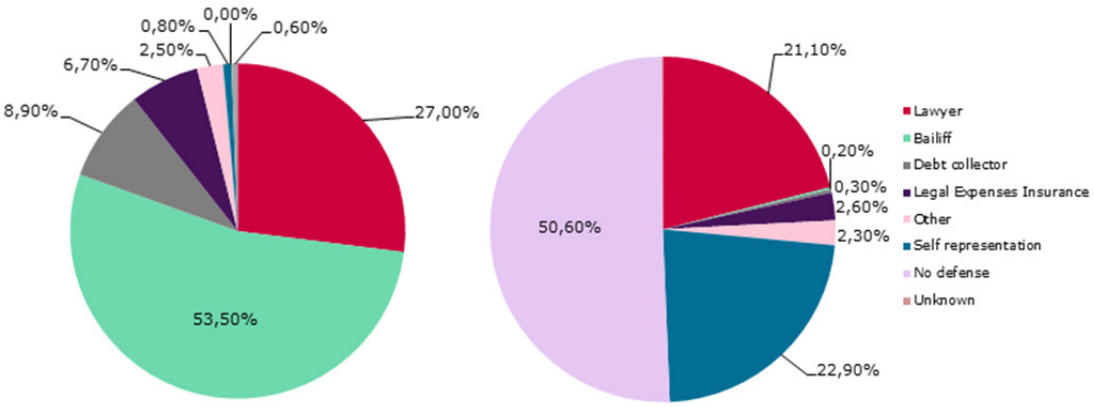
Figure e2 Weekly number of incoming commercial cases, in three categories of financial value



The choice of legal representation

With the freedom to choose between legal representatives, and the option to do without, the landscape of representation has changed substantially in the € 5,000-€ 25,000 segment. Claimants and defendants differ substantially in their choices regarding representation. Figure e3 visualizes the choice of legal representation by claimants and defendants.

Figure e3 The choice of legal representation, by claimants (left) and defendants (right)



Data on representation were established from Court files of cases terminated in 2014 (a sample of 2,250 cases handled at 9 court locations).

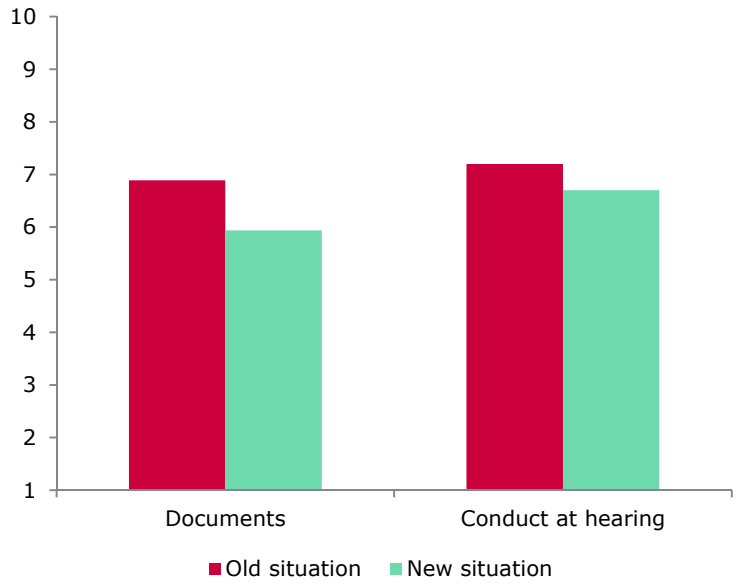
Very few claimants (1%) use the option of doing without a representative. Only 27% still choose a lawyer as a representative. The most popular choice for claimants is a bailiff (53.5%). Nine percent of claimants are represented by a debt collection agent, seven percent by a legal expenses insurance company. The cases in which bailiffs and debt collection agents represent the claimant differ in various ways from the cases in which lawyers or legal expenses insurance companies represent the claimant. As expected, in the cases with bailiffs and debt collection agents, the claimants are mostly legal entities such as organizations, repeat players, and a majority of these cases are undefended. The majority of individuals as claimants are represented by a lawyer or legal expenses insurance company, and the majority of these cases are defended.
Half of the defendants do not defend themselves. Of those who do defend themselves, almost half do so without a representative. If a representative is hired, defendants typically choose a lawyer (in 80% of defended cases with representation). Proceedings in defended cases without representation are generally fast and uncomplicated. Over 80% of cases are lost by the defendant. Cases in which the defendant is represented by a lawyer or legal expenses insurance company usually take more time and, on average, more steps are taken during the proceedings. The likelihood that the defendant wins, or that at least the claimed amount is substantially reduced, is around 40%. It should be noted that the different outcomes for defendants with and without representation, could well be attributed to self-selection: defendants who believe their chances of winning are low, will be less motivated to invest in legal representation.

The quality of services of legal representatives

A major issue in the political debate on the measure evaluated in this study were concerns about the quality of the services provided by representatives in court cases. In the old situation, both parties were obliged to hire a lawyer. The profession of lawyers is subject to quality standards, rules, complaints and disciplinary procedures etc. What if anyone is allowed to provide services as a representative, and people without any legal education or experience represent themselves? In this study, the quality of services of legal representatives has been measured by means of peer review. The initial documents (anonymized writ and reply) were reviewed by a forum of lawyers, judges and court staff. Likewise, the conduct of representatives and self-representing parties at court hearings was reviewed by judges. The parties in these cases were asked to fill in a questionnaire, which included client satisfaction (with respect to their representative) and procedural justice (with respect to the handling of their case).
The peer assessments in the old and the new situation indicate the quality of representation has decreased. On a scale of 1 to 10, the quality of the initial documents dropped by a full point, representation at hearings by a half point (see figure e4). This decrease is mainly due to the conduct of parties without representation. Their knowledge of law and legal proceedings is often too limited; some also lack the language skills necessary to participate in a legal debate.
If the self-representing parties are left out of the comparison, no statistically significant difference remains between the old and the new situation.

The research allows for comparisons between various types of representatives (limited by the number of measures within groups, and the non-random deployment of representatives). A positive surprise is the perceived quality of services provided by legal expenses insurance companies. In the old situation, the cases of insured parties would generally be handled by a lawyer that had a contract with the insurance company; in rare cases, insurance companies would employ lawyers themselves, or just pay for the lawyer chosen by the client. In the new situation, employees of a legal services company associated with the insurance company will handle the cases. In both the old and the new situation, peer ratings in cases of insured parties are the highest. Ratings of relatively rare providers of legal services – taken as a group – tend to be on the lower side. Among these 'rare' providers, we find organizational consultancies, accountancy firms, employer and labor services organizations, legal consultancies, and others.

Figure e4 Peer ratings of quality of documents and representation at the court hearing (scale: 1-10), old and new situation (higher scores equals higher quality)



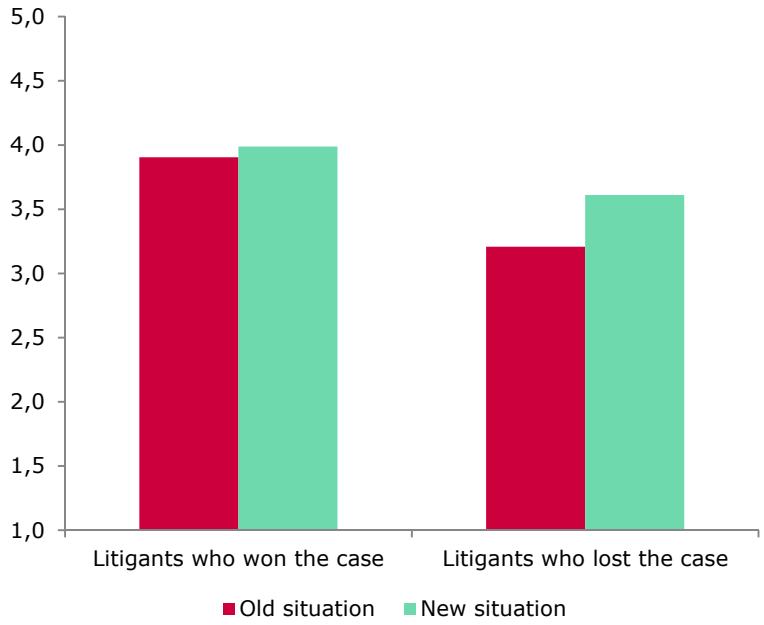
Evaluation by parties

In both the old and the new situation, litigants were asked multiple questions about their experience with the court proceedings and the services provided by their representatives. The parties participating in the surveys overlap with those whose representatives were reviewed by peer ratings. This allowed for a comparison of peer ratings with procedural justice scores and client satisfaction. Since some of the parties already knew the judgment in their case at the time of the survey, all responses have been analyzed for 'winning' and 'loosing' parties separately. So, when comparing procedural justice ratings in the old and the new situation, we compare winners in the old and winners in the new situation, and do the same for losing parties.

It should be noted that the parties' responses mainly pertain to individuals and small businesses. Large companies – that bring many cases before courts – are often unable to answer questions regarding specific cases. They do not 'experience' the court process in the way individuals do; their cases are often completely in the hands of bailiffs or law firms. Another group that is hard to reach are defendants in undefended cases.

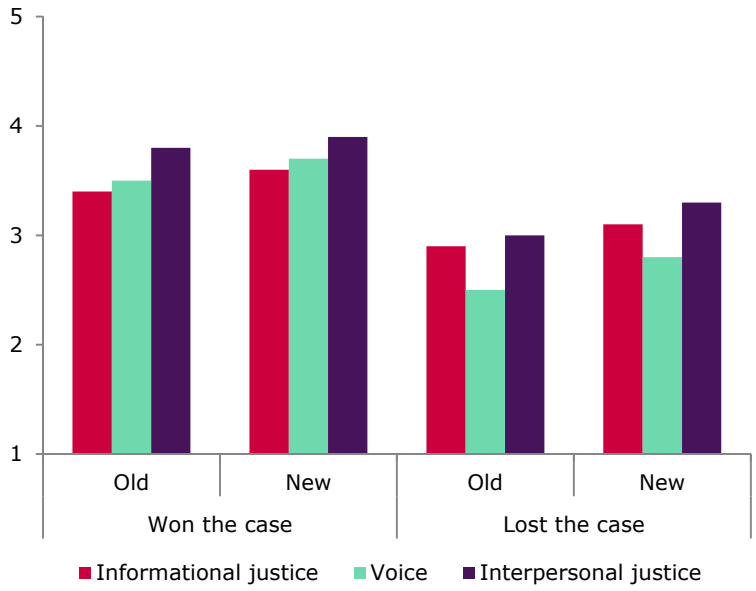
Compared to the old situation, parties are generally more positive about their representation in the new situation (Figure e5), especially litigants who lost the case. The increase might stem from the introduced freedom of litigants in how to defend themselves. The new situation probably no longer includes parties who felt 'forced' to hire a lawyer in order to bring their case before court or to defend themselves. As shown in the section on the choice of representatives, not that many parties choose to be represented by a lawyer if they are not obliged to do so.

Figure e5 Quality of services of representatives as judged by their clients in the old and new situation (scale: 1-5), higher scores indicate higher perceived quality



Procedural justice, as experienced by the parties, is perceived to be better in the new situation than in the old situation (Figure e6). This difference is small (and statistically insignificant) for winning parties, yet substantial for losing parties. The difference between winning and losing parties can be understood from theory on procedural justice, from which a positive relation between procedural justice scores and outcome acceptance can be assumed. Since losing parties have obligations towards the winning parties, it is plausible that the perceived justice among those losing parties translates to a better observance of how the proceedings were conducted. There is another interesting side to this finding. One possible effect of the evaluated measure is an increased inequality between parties in the proceedings due to differences in representation quality. If this is the case, a drop in perceived procedural justice is to be expected. The actual result does, however, not support the inequality thesis (an increase instead of a decrease was observed). It should be noted that the losing parties are mostly defendants. In the old situation, they were forced to hire a lawyer and pay court fees to defend themselves against a claim. The new situation is totally different (no obligation to hire a lawyer, no court fees, the possibility to present their defense orally). All in all, there are many factors accumulating that may lead to a more positive evaluation by defending parties. A precise attribution of effect for each separate factor cannot be made from our research.

Figure e6 Perceived procedural justice in the old and new situation on three of its dimensions: informational justice, voice and interpersonal justice (scale 1-5; higher score indicates greater perceived procedural justice)



Material costs

In surveys, parties have been asked about the costs they incurred during the court proceedings. They were asked to calculate only real (financial) costs, and add or subtract payments for procedural costs to or from the other party. A general reduction of costs was expected, since parties are no longer obliged to hire a lawyer. Overall, the money spent by parties was € 2,000 (median) in the old situation, and € 1,162 in the new situation. If parties with legal expenses insurance are left out of the comparison (their median expenses were zero, both in the old and in the new situation), expenses dropped from € 3,000 to € 1,500 (median) for the old and the new situation. Although claimants have to invest more money in the proceedings than defendants, in the end the defendants face the highest costs. This is a result of the losing party having to compensate some of the procedural costs made by the winning party. The amount compensated did not differ much between the old situation (€ 865, median) and the new situation (€ 812); the basic rules used by the judge to calculate this amount did not change.

Changes in the way proceedings develop

Most of the procedural rules in the old and the new situation are the same. The proceedings are under the authority of different judges, however, and in the new situation representation of parties by a lawyer is no longer required. In the old situation, the proceedings would start with an exchange of written statements (writ and reply). In the new situation, the proceedings start with an administrative public hearing, in which the defendants can present their defense orally. How do all these changes affect the way court proceedings develop?

A systematic comparison has been made of procedural steps in the old and the new situation. For the new situation, the analysis was extended by comparison of proceedings by type of legal representative and variations in the way courts organize their processes (for instance, master calendar vs. individual calendar).
On the whole, proceedings have changed substantially. Firstly, as already stated in the section on 'access', the percentage of defended cases rose from 38 to 53%. Our data were not conclusive on the use of the option to deliver an oral defense. What is clear, however, is that the percentage of defended cases in which a full hearing (with judge and both parties or their representatives present) takes place, dropped from 67 to 42%. So, while the possibility for an oral defense is introduced for these cases, the actual percentage of cases in which any kind of oral hearing takes place, decreased. In hearings, judges will stimulate – or even help – parties to reach an amicable settlement. The percentage of defended cases in which such a settlement was reached was 46 in the old situation, and dropped to 28 in the new situation. It is safe to assume that the drop in the use of hearings means that fewer opportunities for parties to reach an amicable settlement are created. We also assume that the absence of lawyers is a factor as well. In the old situation, with both parties being represented, the lawyers could negotiate for them, and/or convince them that an amicable settlement would be a good outcome. With half of the defendants unrepresented in the new situation, conditions for amicable settlements have not improved.
In the new situation, fewer investigative activities take place in the proceedings. During proceedings, judges can call upon experts to investigate and report on issues that require expert knowledge (for instance, medical or financial), hear witnesses, or carry out an on-site inspection. In the old situation, this happened in 9% of the defended cases. In the new situation, this happens in 6% of the defended cases. The processing time dropped from 231 days (median) to 147 days. These findings are in line with the general image of kanton judges, being quick and practical decision-makers (more so than civil section judges).
Research on procedural steps, in relation to the type of legal representative, shows that there are relations between the type of case, the type of representative, and the procedural steps in the handling of the case. Bailiffs and debt collection agents almost exclusively represent claimants, especially repeat players. A high percentage of these cases remains undefended. If the case is defended, the defendant is mostly without a representative. Cases with lawyers and legal expenses insurance companies as representatives are quite the opposite: these cases concern more varied civil disputes, and most cases are defended. A majority of the defendants in these cases have a professional representative.
There has been some variation in the way the raise of the small claims limit was implemented by the Courts. There are a few courts in which the cases are still being handled by the civil court section judges (formally functioning as 'kanton judges' when they handle these cases). This variation has been used for more in-depth research on the 'why' behind the changes in how proceedings develop in the old and the new situation. When the measure was proposed, much emphasis was placed on the different 'profile' of the kanton judge. What if we look at the civil court section judges who now handle these cases as kanton judges, with the rules of play changed? If their cases still (more or less) follow the old paths, we would conclude that it is indeed the different profile of the kanton judge that makes the difference. What was found, however, is that where, in the new situation, cases are handled by civil court section judges, the same changes have occurred as at courts where kanton judges took over. So it seems that the changes in how proceedings develop are, to a large extent, the result of changing the rules of play. No major differences were found between proceedings handled under a master calendar and under individual calendars.