Crisis and Recovery Act: evaluation of provisions relating to judicial procedures

Summary

Introduction

On 31 March 2010 the Chw (Crisis- en herstelwet = Crisis and Recovery Act) came into force. The purpose of the Chw is to accelerate the execution of infrastructure, construction, sustainability, energy and innovation projects in order to alleviate the economic crisis and to promote the recovery of the economic structure of the Netherlands. To this end, Chapter 1 of the Chw contains provisions intended to accelerate decision-making and legal protection procedures relating to these projects.

It was the intention that the Chw would only be in force for a short time; it was supposed to lapse as of 1 January 2014. Partly on the basis of the results of the evaluations of the Chw, it was decided that the Act should remain in force for a longer term. On 25 April 2013 the ‘Act amending the Crisis and Recovery Act and various other laws in connection with making the Chw permanent and making improvements in environmental law’ came into force. The validity of the Chw has been extended indefinitely. Article 5.9a of the Chw regulates the evaluation of the operation of the instruments listed in Chapter 1 of the Chw with the aim of accelerating and improving the projects to which these instruments apply. The current evaluation has been carried out to meet the provisions of Article 5.9a Chw.

Object of the evaluation

A specific objective of the Chw is to ensure that the preparation of decisions to implement infrastructure, building, sustainability, energy and innovation projects, and also any appeal proceedings against those decisions, are conducted as efficiently as possible. To this end, Chapter 1 of the Chw contains several provisions relating to decision-making and legal protection which differ from the corresponding provisions in the Awb (Algemene wet bestuursrecht = General Administrative Law Act) and – in the case of one provision – from the Wet milieubeheer (Environmental Management Act). The main content of the instruments currently set out in Chapter 1 is as follows.

- Provisions relating to decision-making procedures
  - Easing of obligation to produce an environmental impact assessment (Article 1.11); easing of rules regarding recommendations (Article 1.3); lighter burden of investigation in the renewed decision-making process after a decision has been annulled (Article 1.10)
- Provisions relating to judicial procedure: access and grounds of appeal
  - Grounds of appeal must be submitted before the end of the time limit (Article 1.6(2); after the time limit has expired, no further grounds of appeal may be submitted
To which projects do the provisions under Chapter 1 of the Chw apply? Schedules I and II to the Chw in particular are important in this respect. Schedule I describes several projects in general terms (for example, zoning plans which allow for the construction of 11 or more dwellings); Schedule II refers to several specific projects by name (for example, Amsterdam Noordelijke Ijoevers).

For projects matching those described in Schedule I, the provisions of Section 1.2 (Articles 1.3 to 1.10) of the Chw apply. For projects referred to in Schedule II, Section 1.3 (Article 1.11) of the Chw applies as well, as is made clear by Article 1.1 of the Chw. Article 1.2 of the Chw provides that projects can be added to the Schedules to the Chw by Order in Council. In recent years this has happened frequently.

Purpose statement

The evaluation aims to find answers to the following four questions:

1. Do the instruments under Chapter 1 of the Chw help to expedite procedures relating to the projects designated by Articles 1.1 and 1.2 of the Chw and do these instruments help to expedite the commencement of projects for which the procedures are intended?
2. If so, in what way?
3. To what extent do these instruments, in the opinion of those involved in applying the Act, affect the legal quality of the decisions in question?
4. To what extent do those involved in applying the Act (administrative bodies, courts, third parties) experience problems or side effects associated with the use of these instruments?

Structure of the evaluation

This evaluation builds on the empirical study carried out in connection with the first evaluation of the Chw. This study followed a number of different lines. The starting point was to gather judgments handed down by the body which deals with the vast majority of Chw proceedings – the Administrative Division of the Council of State. Four hundred and fifty-one judgments were found, dating from between mid-March 2012 and the end of 2013. In addition, for 40 projects which led to judicial appeal proceedings we examined whether there
was any relationship between the proceedings at the Administrative Division and their outcome on the one hand and commencement of the project on the other. For a selection of the projects referred to in Schedule II of the Chw we examined to what extent Article 1.11 of the Chw was used in decision-making relating to the implementation of the projects. To supplement these investigations, we interviewed eighteen people whose expertise and/or experience enabled them to provide us with information about the operation of the various instruments under Chapter 1 of the Chw.

Findings

Contribution of the Chw instruments to acceleration
The first two questions in the purpose statement are about the extent to which and the way in which the instruments under Chapter 1 of the Chw help to expedite procedures to implement the projects to which the Chw applies and to expedite the commencement of the projects themselves. In our answer to the question about expediting procedures, we distinguish between provisions about decision-making and provisions about proceedings before the administrative court.

With regard to proceedings before the administrative court (the Administrative Division of the Council of State), the following conclusions can be drawn from the findings of the study.

- The administrative court’s obligation to pass judgment in Chw cases within six months (Article 1.6(4)) has a positive effect on the speed with which Chw cases are settled. Although in 57% of cases the 6-month time limit for passing judgment is not met, it is not exceeded by very much. On average, Chw cases are settled in 7.4 months, which is about 40% faster than the time in which comparable cases are settled by the Administrative Division. The Division is also getting better at dealing with Chw cases more quickly. The average time spent dealing with a case dropped from over 8 months at the beginning of the investigation period to approximately 6 months by the end of the investigation period. This means that Article 1.6(4) of the Chw has positive consequences for the speed with which the administrative court settles cases to which this provision of the Chw applies.

- Is there an effect on the outcome of the appeal as well as on the speed with which it is settled? Such an effect may exist if the contested decision is upheld due to the fact that an administrative body was not allowed to appeal (Article 1.4), that an appellant has failed to submit grounds of appeal within the time limit (Article 1.6(2)), or that grounds for appeal submitted by the appellant after the time limit has expired are not considered in the assessment of the decision (Article 1.6a). Judging by the rulings we analysed, there is at most a very limited effect. In 1% of the cases an administrative court was not allowed to appeal, while in 4% of the cases a ground for appeal submitted after the time limit had expired was not considered. This means that in these cases it is imaginable that the outcome of the proceedings might have been different if the administrative body had been able to take part in the proceedings or if the grounds for appeal submitted after expiry of the time limit had been taken into account in the assessment of the lawfulness of the decision. On the basis of this investigation, it is not possible to establish if this would in fact have been the case.
As regards decision-making procedures, Articles 1.3 (duty to ascertain), 1.11 (easing of the obligations regarding environmental impact assessment) and 1.10 (re-using evidence found previously for renewed decision-making) are relevant.

- As regards Article 1.3 Chw: we have no evidence whatsoever that this provision is deliberately applied by administrative bodies or that they benefit from its validity. It is certain that there is no case law on Article 1.3 Chw. It seems very likely that this provision makes no special contribution to expediting projects.

- As regards Article 1.11 Chw: it is evident that in a substantial number of projects its applicability is not relevant, because when Article 1.11 Chw came into force, those projects had already passed the stage at which a decision had to be made about investigating alternative options and/or seeking the advice of the Netherlands Commission for Environmental Impact Assessment had already been passed. When the question whether or not to use this provision does arise in projects, the decision to use it is made about as frequently as the decision not to use it. We were unable to establish whether or not use of Article 1.11 Chw saves time. The experiential experts we consulted did not answer this question consistently.

- As regards Article 1.10 Chw: in the period of investigation we did not find a single judgment in which the applicability of this provision was relevant. It seems that Article 1.10 Chw does not provide administrative bodies with much more leeway than they already had before that provision came into force. Moreover, with decisions to which the Chw applies it occurs only rarely that the administrative body is faced with the question whether it should base its new decision on evidence (investigative reports) on which the previous decision – now annulled – had been based. The application of the ‘administrative loop’ plays a role in this, because if it is applied there will be no annulment and Article 1.10 Chw will not be relevant. Whether or not the administrative body may use ‘old’ evidence in its new decision-making process would then also be made clear by the interlocutory ruling applying the administrative loop.

Another question is to what extent there is a relationship between the speed with which an appeal under the Chw is settled and the speed with which the project to which the appeal proceedings relate is executed. This varies widely. The present study examined the relationship between the appeal proceedings and the progress of 40 projects associated with appeal proceedings to which provisions of Chapter 1 Chw applied. In 11 of these cases it is plausible that they may have benefited from the relatively speedy settlement of the appeal proceedings. For 4 of the 40 projects, given the duration of the project as a whole, only a relatively limited amount of time was saved. For a variety of reasons the other 25 projects did not benefit from the fact that a judgment had to be pronounced within six months. Some of these reasons were that there was no question of a relatively quick judgment, that the appeal was upheld, that the fact that the appeal was brought before the court did not lead to postponement of the execution of the project, or that the project only commenced or recommenced quite a long time after the administrative court had passed judgment.
An important finding of this study is therefore that the speed with which the proceedings before the administrative court are settled are related only to a limited extent to the speed with which the project is actually executed.

*Consequences of the Chw instruments for legal quality*

As regards the relationship between the instruments under Chapter 1 of the *Chw* and the legal quality of *decisions*, again we distinguish between provisions relating to judicial procedures and provisions relating to decision-making procedures.

- If the court applies one of the provisions relating to judicial procedures and it then rules that the contested decision should be upheld, then the decision in question has survived the judicial review whereas this *might not* have been the case if that provision had not been in force. This is true of each of these provisions. However, the analysis of the *Chw* judgments handed down by the Administrative Division and the interviews with experiential experts have not led us to think that application of these instruments has a more than marginal effect on the outcome of the proceedings. There is therefore no reason to suppose that the procedural provisions of the *Chw* are detrimental to the legal quality of decisions.

- As regards the provisions relating to decision-making procedures, the following conclusions can be drawn. There is no indication whatsoever that Article 1.3 *Chw* is ever applied. Article 1.11 *Chw* is applied occasionally. We found no evidence that its application adversely affects the legal quality of decisions. In practice, in connection with careful preparation administrative bodies attach relatively high value to investigating and presenting more environmentally friendly alternatives in the environmental impact assessment and to the role of the Netherlands Commission for Environmental Impact Assessment. Finally, Article 1.10 *Chw* has not essentially increased the leeway administrative bodies have when making a new decision after a decision has been annulled; the consequence is that this provision cannot lead to any essential deterioration of the quality of decision-making.

Another question is what the consequences of the *Chw* instruments are for the legal quality of the *administration of justice* by the administrative court. This study prompts us to make two comments about this. Both relate to how the time limits which apply for the parties and the court involved in the appeal proceedings affect the quality of the court’s handling of the case.

- It is clear that the 6-month time limit puts pressure on everyone involved, and it is also clear that there may be risks associated with this, for instance the risk of loss of legal quality as regards the documents written by the parties. The appellants and the respondent have less time for the notice of appeal and the statement of defence, and appellants have fewer opportunities to rectify omissions. The investigation did not show that this frequently leads to problems. It seems that in practice parties and courts manage with the new time limits. Whether or not the Division succeeds in settling *Chw* cases quickly partly depends on whether the respondent manages to meet the deadline; if the respondent submits a substantive statement of defence too late, this will have an adverse effect on the efficiency of the Division’s preparation of the case, because once the statement of defence has arrived, the file will have to be re-examined.
- There is no evidence that the 6-month time limit for judgments has consequences for substantive aspects of the court’s handling of the case. While the court seeks expert advice (from StAB, the foundation which advises courts in environmental and spatial planning disputes) somewhat less often in Chw zoning plan cases, the difference in relation to non-Chw planning zone cases is not significant.

Problems and side effects associated with the use of the Chw instruments

In the course of the investigation people involved in applying the Act mentioned certain problems and side effects which arise in association with the Chw instruments. We found confirmation of three of these in our investigation.

1. The 6-month time limit for judgments is not conducive to effective handling of cases

The fact that cases to which the Chw provisions apply must be settled within six months means that the Division deals with those cases according to a tight work schedule. Interviews within the Division revealed that this works efficiently so long as all parties involved carry out all the procedural actions in good time. But there is no flexibility in the system. If the administrative body fails to produce a statement of defence on time, the substantive assessment of the case just starts anyway. Then if after some time a statement of defence is submitted – which happens quite frequently – the file has to be re-examined. All in all, the 6-month deadline is too short for cases to be handled with optimal efficiency.

2. The applicability of the Chw is often only realized at a late stage of the proceedings

Parties often only discover at a late stage that the Chw applies to the decision-making and legal protection procedures. It seems that while the parties are often aware that the Chw applies to the most essential decisions involved in a project (such as those relating to a zoning plan), they often do not realize that the Chw also applies to a substantial number of other decisions – particularly implementation decisions. In the conclusion of the first Chw evaluation the expectation was expressed that the number of decisions to which the procedural provisions of the Chw applied would increase very substantially, particularly because the Chw applies not only to decisions approving certain categories of zoning plan, but also to decisions made to implement those zoning plans. This expected increase in the number of cases handled by the administrative court to which the Chw applied failed to occur. It is difficult to give a consistent explanation for this. One reason we gleaned from the interviews with experiential experts is that in some cases the parties are not aware that the Chw applies to a decision. In some cases this is down to ignorance, but in others an administrative body is actually aware that the Chw may apply, but fails to do anything about it. Another possible explanation is that the most important objections are made to the most essential decisions and that fewer appeals are lodged against other decisions (such as implementation decisions).

The consequence of the fact that an administrative body does not realize that Chw provisions apply to a certain decision is that this fact will probably be discovered in the course of the proceedings before the Administrative Division, which will reduce the chance of the 6-month time limit being met.
3. No straightforward relationship between a quick judgment and quick commencement of the project

A third problem is the lack of a straightforward relationship between the acceleration of decision-making and judicial procedures and the acceleration of the actual execution of the projects, which was the goal of these provisions. The original explicit purpose of the Chw was to ensure that the projects to which the Act applied were executed more quickly than would have been the case if the provisions of Chapter 1 of the Chw had not applied. This objective is attained only to a very limited extent, particularly since there is no straightforward relationship between the acceleration of decision-making and legal protection procedures on the one hand and the execution of the project to which the procedures relate on the other. Although the main concern is that it is good for legal certainty if clarity about the irrevocability of the decisions needed to execute a certain project is achieved sooner, some projects commence even without absolute legal certainty (often because the government itself is the initiator), while with other projects the administrative court’s handling of the case – accelerated or not – does not affect the time when the project commences. There is no clear-cut causal relationship between the acceleration of the decision-making and legal protection procedures and the actual commencement of the project.

Possible solutions for the problems

The working procedure of the Administrative Division is important in connection with the first and second problems. Cases are registered at the Administrative Division by clerks. If it is not clear from the contested decision or the contested judgment that the Chw applies to the case, then – with some exceptions – at the time the case is registered no-one will realize that the Chw applies and therefore the case will not be fast-tracked. In some cases it is discovered in the course of the proceedings that the Chw applies, but by then it is usually too late to meet the 6-month deadline.

For every two cases where it is known that the Chw applies to them when they are appealed to the Administrative Division, there is one where this is only discovered in the course of the proceedings. Interviews at the Division revealed that if an administrative body has not fulfilled its obligation to mention that the Chw applies to a particular case, the Division does not feel responsible if the time limits under Article 1.6 of the Chw are not met. There is no independent investigation of each case to which the Chw might theoretically apply to establish whether or not it does in fact apply – and certainly not right at the beginning of the proceedings.

The point of departure in proceedings before the administrative court is that the court limits itself to assessing the points of dispute put forward by the parties. Whether or not the Chw applies is not something to assess a contested decision or challenged judgment on; it is a matter of a rule for the administrative court itself. This means that the court must establish whether the Chw applies, since if it does, the consequence is that the court must pronounce judgment within six months. However, a thorough investigation for every appeal as to whether or not the Chw applied would require an adaptation of existing working procedures which would be extremely problematic in terms of efficient case settlement. If the
investigation required to establish whether the Chw applies is not carried out until the preparation for the hearing, then generally it is too late to meet the 6-month time limit.

In this respect the requirements of the law are at odds with the requirements of practical feasibility. Three options are open. One is to accept the situation as it is; the second is to try to adapt practice to meet the requirements of the law; and the third is to adapt the law to meet practical requirements. We recommend the last option. This point is too important to ignore. The 6-month time limit is the most important of the acceleration instruments of the Chw. Moreover, it is unfortunate if the highest administrative court in the Netherlands essentially fails to comply with the law.

One factor in our preference for adapting the law to meet the needs of actual practice rather than the other way around is that in some cases no-one has realized that the Chw applies and apparently none of the parties has drawn attention to the fact that the Chw applies (otherwise this should have been evident from the documents). We would also like to point out that if rapid execution of a project is in a party’s interest, that party can be expected to seek appropriate legal expertise. In practice, the need to benefit from the acceleration instruments is apparently not equally great in all cases. It would therefore be going too far to require the Division to check whether the Chw applies to each appeal as soon as it is lodged. We recommend that efforts should be made to introduce legal provisions to deal with this problem.

Finally, a comment on the third problem. The investigation shows that it is difficult to achieve the objective of the Chw originally formulated by the lawmakers (in short, to stimulate the economy) by means of legislation which intervenes in decision-making and legal protection procedures. It therefore does not seem realistic to have high expectations as to what can be achieved through legislation in this context.