Executive summary: evaluation of the procedural provisions of the Crisis and Recovery Act

Introduction

The goal of the *Crisis and Recovery Act* (CRA), which came into force on 31 March 2010, is to accelerate the execution of major 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. In view of its objectives, the CRA is temporary legislation. The intention is for the Act to lapse as of 1 January 2014.

A specific objective of the CRA is to ensure that the preparation of the decisions to implement the projects in question and any appeal proceedings against those decisions are conducted as efficiently as possible. To this end, Chapter 1 of the CRA contains several provisions relating to decision-making and legal protection which differ from the corresponding provisions in the *General Administrative Law Act* (GALA) and – in the case of one provision – from the *Environmental Management Act*. The provisions about legal protection regulate *access* to proceedings, *review* by the court and the *time limit* within which judgment must be pronounced. The provisions about decision-making have to do with advice sought during the decision-making process and with environmental impact assessment.

Specifically, the main features of the regulation are as follows:

- Judicial proceedings: 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 (Article 1.6a); local and regional government authorities have limited right of appeal (Article 1.4)
- Judicial proceedings: reduced time limits
    - The court must expedite appeal proceedings (Article 1.6(1); the court must pronounce judgment within 6 months after the time limit for appeals has lapsed (Art. 1.6(4); if the Stichting Advisering Bestuursrechtspraak (StAb: a foundation which advises the court in questions relating to environmental and spatial planning disputes) is asked for advice in connection with the judicial proceedings in question, a time limit of 2 months applies for the foundation to make its recommendations (Article 1.6(3)
- Judicial proceedings: review and judgment
    - The court has wider scope for disregarding defects in the contested decision (Article 1.5); a 'relativity-principle' meaning that claimants can only invoke only rules that are specifically meant to protect their rights (Article 1.9)
- Decision-making process
    - easing of obligations relating to environmental impact assessment (Article 1.11); easing of rules regarding compliance with recommendations (Article 1.3); lighter burden of investigation in the renewed decision-making process after a decision has been annulled (Article 1.10)

To which projects do the provisions under Chapter 1 of the CRA apply? Schedules I and II to the CRA 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). If the project in question fits a description in Schedule I, then the provisions of Section 1.2 of the CRA (Articles 1.3 to 1.10) apply. If the project is referred to in Schedule II, then Section 1.3 (Article 1.11 of the CRA) applies as well, as is made clear by Article 1.1 of the CRA. Article 1.2 of the CRA provides that projects can be added to the Schedules to the CRA by Order in Council.

Article 5.9 of the CRA provides that 'within two years after this Act has taken effect' the Minister of Safety and Justice, in conjunction with the Minister of Infrastructure and Environment, 'will [send] the States General an evaluation of the effects of the instruments contained in Chapter 1 of this Act on the acceleration and improvement of the projects to which they apply'. The present report is a summary of the evaluation study conducted to fulfil the obligation formulated in Article 5.9 of the CRA.

Problem statement

The problem statement of the study was as follows:

1. *Do the temporary instruments under Chapter 1 of the CRA help to expedite procedures relating to the projects designated by Articles 1.1 and 1.2 of the CRA?*
2. *To what extent do these instruments and their application affect the legal quality of decisions?*
3. *To what extent is the use of these instruments associated with other effects or problems?*
4. *Are the temporary instruments under the CRA suitable to be applied in other situations besides those covered by the present CRA?*

Two components

The study conducted to answer these questions consists of two components: one is a legal normative study, and the other is empirical. The legal normative study analyses the provisions in Sections 1.2, 1.3 and 1.4 of the CRA, seeking to determine what assumptions and expectations the legislator had in relation to each separate provision as regards acceleration and improved quality. Based on a review of the literature, these assumptions and expectations are compared with views put forward in legal literature. Finally, this part of the study analyses court judgments pronounced by Dutch administrative courts relating to provisions of Chapter 1 of the CRA since the Act came into force.

The empirical component of the study aimed to ascertain the effects the various instruments under Chapter 1 of the CRA had on the speed and quality of the CRA projects. This study followed a number of different lines. In the first place, as many administrative court judg-

ments as possible relating to appeal proceedings subject to the procedural provisions of Chapter 1 of the CRA were collected. Over 200 judgments were found. In the second place, twenty CRA projects which led to judicial appeal proceedings were analysed in detail. To supplement these investigations, we interviewed a large number of 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 CRA.

Findings

In our presentation of the findings we will follow the four aspects of the study represented in the four sub-questions of the study. The following questions are discussed: to what extent do the instruments in Chapter 1 of the CRA help to expedite projects and the procedures to approve them, whether the instruments under Chapter 1 of the CRA affect the legal quality of decisions, to what extent the use of these instruments is associated with other effects or problems, and to what extent the instruments in Chapter 1 CRA would be suitable to use in other situations besides those covered by the CRA.

1. The contribution of instruments in Chapter 1 CRA to the acceleration of projects and the procedures to approve them

To what extent do the instruments in Chapter 1 CRA help to expedite decision-making processes and administrative appeal procedures, thus helping to accelerate the CRA projects in question?

With regard to *administrative court proceedings*: based on the examination of over 200 judgments in proceedings in which provisions of Chapter 1 CRA applied, we drew the following conclusions.

Firstly, the study shows that in 62% of CRA cases the 6-month time limit for passing judgment set out in Article 1.6(4) CRA was not met. Nevertheless, on average it takes 8 months for a CRA case to be settled, which is approximately 25% faster than the time it takes for an average administrative appeal case to be settled.

A second conclusion pertains to the effect of the applicability of one or more of the procedural provisions of Chapter 1 CRA on the outcome of the appeal. Such an effect *may* exist if the outcome of the proceedings is that the contested decision is upheld and the court has applied one of more of the following provisions: Article 1.4 (limitation of opportunities for local and regional government authorities to appeal), Article 1.5 (wider scope for the court to disregard defects in the contested decision), Articles 1.6(2) and 1.6a (limitation of opportunities to submit grounds of appeal) and/or Article 1.9 CRA (relativity-principle). In 24% of the cases with a final ruling in which the contested decision was upheld, the court applied one or more of these provisions. However, among the cases in which one or more of these provisions was applied and the appeal was dismissed on its merits, there is only one of which we can state with certainty that one of the provisions under Chapter 1 CRA prevented the appeal being allowed. In its ruling on this case, the court says that the contested decision is wrongful, but may never-

theless remain in place because of the applicability of the relativity-principle of Article 1.9 CRA.

A final finding has to do with the relationship between the speed with which an appeal under the CRA is settled and the speed with which the project the appeal proceedings relate to is executed. This varies widely. The study examined the decision-making processes of 20 projects associated with appeal proceedings to which provisions of Chapter 1 CRA applied. In 6 of the 20 cases it is plausible that they benefited from the relatively speedy settlement of the appeal proceedings; however, in all 6 cases only a relatively limited amount of time was saved given the duration of the project as a whole. For a wide variety of reasons the other 14 projects did not benefit from the applicability of the 6-month time limit for judgments in appeal proceedings under Article 1.6(4) CRA. Some of these reasons were: the court did not pass judgment any more quickly than in regular, non-CRA cases, the appeal was upheld, the fact that the appeal was brought before the court did not lead to postponement of the execution of the project, or the project only commenced or recommenced quite a long time after the administrative court had passed judgment.

As regards *decision-making processes*, the findings relating to the instruments in Article 1.10 (re-using evidence found previously for renewed decision-making) and 1.11 CRA (easing of the obligations regarding environmental impact assessment) are relevant.

We found that to date administrative authorities have not often had to decide whether or not to use the discretionary powers granted by Article 1.11 CRA. At least two reasons for this can be given. The first is that Article 1.11 CRA only applies to decisions about projects included in Schedule II to the CRA. Many of those projects are still at the preliminary stage, so that the question whether Article 1.11 CRA would be used or whether other options would be examined and the advice of the Netherlands Commission for Environmental Impact Assessment would be sought had not yet arisen. For projects included in Schedule II that were already underway when the CRA came into force, application of Article 1.11 CRA was not relevant, because the obligations for which an exemption might have been granted by virtue of Article 1.11 CRA had already been fulfilled. To the extent that administrative bodies have already had the option of making use of Article 1.11 CRA, their choices have varied. In some cases they did make use of the freedom offered by Article 1.11 CRA, and in other cases they chose to investigate alternatives – although not obliged to do so – and to ask the Netherlands Commission for Environmental Impact Assessment for advice.

With regard to Article 1.10 CRA (reusing evidence found in a previous investigation) we would like to make the following comments. The judgments passed in CRA cases so far include only one in which the applicability of Article 1.10 CRA was relevant. However, the available judgments in CRA cases do provide us with an idea of the extent to which administrative authorities might benefit from this provision. We analysed the grounds for annulment in the available judgments which annulled the contested decision, thus compelling the administrative body in question to make a new decision. It turned out that for fewer than half of those judgments (11 of the 27) the administrative body in question was able to benefit from the freedom of choice offered by Article 1.10 CRA, while in over half of the cases (16 of the 27) it was not.

2. The effects of the instruments under Chapter 1 CRA on the legal quality of decisions

If the court decides to apply one or more of the provisions of Chapter 1 CRA and if as a result of its judgment the contested decision is upheld, then this means that the decision in question has survived judicial review while it *may not* have done so if these provisions had not been applied. In other words, every time one of the procedural instruments under Chapter 1 CRA is applied and the contested decision is upheld, it is *conceivable* that *as a result of the applicability of one or more of those instruments* a decision that is wrongful (and therefore of substandard legal quality) will remain in place. However, there is only one case in which we can be certain that as a result of the application of Article 1.9 CRA the court failed to annul a wrongful decision.

3. Other effects of or problems associated with the application of the instruments under Chapter 1 CRA

Interviews with people involved in proceedings about CRA decisions have not produced any evidence that when administrative bodies make such decisions they take the restriction of legal protection remedies in CRA proceedings into account. These interviews also failed to produce any evidence that the quality of the court's handling of a case is affected by the fact that it must pass judgment within 6 months. However, it is striking that in CRA cases the court asks for advice from the StAB (the foundation which advises courts in environmental and spatial planning disputes) less frequently than in comparable cases in which the procedural provisions of the CRA do not apply.

A possible side effect often mentioned in the interviews held in connection with this evaluation is the impact of the 6-month time limit on the workload of the courts and on the time taken to settle other administrative appeal cases. There was a high degree of consensus among the interviewees on this point. They have observed that the cases to which the procedural provisions of the CRA apply lead to an increase in the workload of the Administrative Division of the Council of State, the court which most frequently deals with these cases, and also that the obligation in Article 1.6(4) CRA means that it takes longer for other cases to be settled. Because the obligation to accelerate CRA cases is only one of many possible factors affecting the speed with which appeal cases are settled, we were unable to confirm this effect.

However, the number of decisions to which the procedural provisions of the CRA apply may be expected to increase very substantially in the near future. In particular, a sharp increase can be expected in the number of zoning decisions approving the construction of more than 11 dwellings. The 6-month time limit applies to *all* decisions required for the implementation of such zoning plans. The fact that courts already have difficulty meeting this time limit justifies the expectation that the effect of Article 1.6(4) CRA will decrease as the number of cases to which this provision applies increases. In a nutshell, the more frequently an administrative court has to settle a case within 6 months, the smaller the chance will be that it will meet that time limit and the greater the chance that the settlement of other cases takes even longer.

4. The desirability of making the instruments under Chapter 1 CRA permanent and standard practice

To what extent are the instruments under Chapter 1 CRA suitable to be made permanent or standard practice? In other words, should they continue to apply beyond the date referred to in the CRA, namely 1 January 2014? And should they apply to all decisions under administrative law? Should these temporary instruments be incorporated into the General Administrative Law Act? The sections below discuss each of the instruments under Chapter 1 CRA, indicating on the basis of the findings of the legal normative study and the empirical study to what extent each should be made permanent or universal.

Limitation of opportunities to submit grounds of appeal (Art. 1.6(2)/1.6(a) CRA)
These two provisions can be regarded as drastic limitations of opportunities to submit grounds of appeal. They affect the fundamental right of access to justice. It is not advisable that they should be made permanent, let alone universal. In a nutshell, the reasons for this are that they lead to technical bickering which does not go to the heart of the dispute; the case law contains many discussions about whether a point brought forward in a particular case is a new – and therefore inadmissible – ground of appeal or an admissible addition to a previously submitted ground. If the provisions are in fact used to declare grounds inadmissible, they undermine confidence in the rule of law.

Should the legislator nevertheless decide to make these instruments permanent, then it is seriously recommended that the wording of Article 11 of the CRA Implementation Decree should be amended in such a way that it explicitly states that if an appeal or letter of objection is not accompanied by grounds or not accompanied by sufficient grounds it will be dismissed, without any opportunity being provided to remedy this breach of procedural rules.

Restriction of local and regional government authorities' right of appeal (Art. 1.4 CRA)
The GALA contains regulations (Article 1:2(2)) which in practice – partly due to relevant case law – already ensures that administrative authorities have limited opportunities to appeal against the decisions of other administrative bodies. For general administrative law, the sufficient interest requirement specifically tailored to administrative bodies which is set out in Article 1:2(2) of the GALA will suffice. One argument supporting this view is that many different kinds of legal relationships are covered by this general regime. If administrative authorities (or administrative organizations) could only challenge administrative decisions which target them specifically, then in certain situations the right to appeal would probably be unintentionally excluded. This applies not only to situations relating to specific administrative responsibilities, but also to situations involving the legal position of the government organization in question, such as its position under property law.

Acceleration of judicial proceedings (Article 1.6(4) CRA)
The empirical part of the study led to the conclusion that the effect of this provision is relatively limited. In the majority of cases the time limit is not met, and although it is not exceeded by very much, not much time is saved in relation to standard appeal proceedings either. One danger is that other cases will be postponed. People involved in CRA proceedings say that this is already the case. We were unable to confirm this on the basis of the data available to us, but it is plausible that the expected increase in the number of cases to which the proce-

dural provisions of Chapter 1 CRA apply will make it even more difficult for courts to meet the 6-month time limit for judgments and also that the effect of other cases being sidelined will become more pronounced. Moreover, no clear connection could be ascertained between the accelerated settlement of CRA appeals and accelerated execution of the CRA projects in question. All of this argues against making Article 1.6(4) CRA permanent, especially since administrative courts have the power – laid down in Section 8.2.3 of the General Administrative Law Act – to expedite the settlement of cases they believe must be settled promptly.

Disregarding defects (Article 1.5 CRA)
Before the introduction of the CRA, expectations regarding the contribution of Article 1.5 CRA – which gives the court wider scope for disregarding defects in administrative decisions – to the acceleration of proceedings were not very high. This was not only because the court already has other instruments at its disposal to settle disputes efficiently, but also because a requirement for Article 1.5 CRA – just as for the other instruments – is that the provision may not be applied if there is a real possibility that the defect observed by the court will lead to an infringement of interests. The consequence of this requirement is that Article 1.5 CRA can only be used to disregard *minor* defects. The case law to date is in keeping with this. The provision is applied only sporadically and there are no clear examples showing that this provision saves time. On the other hand, so far the application of Article 1.5 CRA has not led to any particular criticism. The most important advantage of the provision seems to be that courts no longer have to spend a lot of time discussing whether a defect which does not lead to disadvantage for the interested parties should be regarded as an infringement of a procedural rule. Even though it is associated with risks as regards the legal quality of public administration and judicial procedure, Article 1.5 CRA can therefore be regarded as an acceptable codification of a principle which is needed in actual practice.

Significant interest requirement (Article 1.9 CRA)
The case law so far does not make the extent of the effects of Article 1.9 CRA completely clear. The fact that in connection with the bill for the Procedural Administrative Law (Adjustment) Act a provision which is identical to Article 1.9 CRA has been proposed for the GALA is an argument in favour of making this provision permanent as regards to infrastructure projects and also environmental law (in order to gain further experience with the provision). It is in these areas that most cases arise in which appellants invoke standards which do not serve to protect their own interests. The development of the case law should not be discontinued before more clarity has been gained regarding the scope of the provision. While this study has questioned the wording of Article 1.9 CRA, partly in connection with its supposed primary goal, namely to prevent 'improper use' of opportunities to appeal, it does not recommend amending the provision before more experience with the provision has been built up in the case law.

In its discussion of the relativity-principle, this report has already indicated that not only the tension observed between the wording of the Act and the case law, but also in a more general sense the question of which interests a standard actually serves to protect will probably become even more pressing outside the area of environmental law. In view of this, it would not be advisable to make Article 1.9 CRA standard practice at this point.

New administrative decision ex tunc (Article 1.10 CRA)
This provision is based on the idea that no unduly onerous requirements should apply to the investigation to be conducted when an administrative authority has to make a new decision after a decision has been annulled (unless the decision was annulled precisely because the investigation on which it was based was inadequate). From the point of view of getting things done, this is an appealing idea. If the provision is used wisely – if necessary with the support of case law – the quality of the decision-making would not have to suffer. We assume that for general administrative law, in which there is no universal rule that the underlying investigation must be repeated, this will be given shape in case law – to the extent that this has not been done already.

Easing of obligations relating to environmental impact assessment (Article 1.11 CRA)
We concluded that no general statements can be made about the extent to which use of Article 1.11 CRA by an administrative authority helps to accelerate a project. While there may be some advantages (less stringent requirements for the investigation, time saved), there are also risks (inferior quality of decisions, annulment of the decision in question if it is challenged in court). It is interesting that in practice administrative authorities often decide not to use Article 1.11 CRA even though they could do so. In our opinion, the possible advantages of Article 1.11 CRA are not so great that they justify the fact that using it increases the risk of making decisions of inferior quality). This argues against making it permanent.

Compliance with recommendations (Article 1.3 CRA)
The conclusions of the legal study were moderately positive: in technical disputes it is not always realistic to set any more stringent requirements than the duty to ascertain (which argues in favour of a provision like Article 1.3 CRA); this provision is not expected to undermine the quality of decision-making. In view of these conclusions, there is no objection to making the provision universal. The purpose of Article 1.3 CRA is also suited to universal use. One point for consideration is how to define which recommendations the obligation applies to and which it does not, such as internal recommendations.