Summary

The reason for this research is a judgement passed by the district court of Amsterdam in 2011. The court sentenced a suspect to ten years imprisonment for several serious offences which he had committed in 1996. The offences came to light in 2010 through new DNA techniques. The judgement started a debate as the imposed sentence was higher than the sentence permitted by the applicable statutory regulation on the concurrence of offences. The Minister for Security and Justice stated, in a reaction to the judgement, that the current regulation raised questions on subjects such as effectiveness, transparency and consistency. For that reason, the Minister ordered that research be carried-out on the statutory regulation on the concurrence of offences.

Central to this research is the following question: *Is the regulation of articles 57-63 of the Dutch Criminal Code (the regulation on the concurrence of offences) still adequate, with regard to present views (on legal dogmatics, jurisprudence and practice) on the application of concurrence of offences in sentencing and the circumstances surrounding (technological) developments in the field of forensic evidence?*
The technological developments, in view of the judgement by the district court of Amsterdam, are the reason and the context within which this research is done, but are not the subject of the investigation.

In this research we have not just chosen for a description of the data found, but also for bringing the findings together to a level which exceeds legal dogmatics and practice. Considering the huge amount of information, the extent and diversity of arguments, and the variety of participants who have contributed to this research, we have chosen to provide – as much as possible – an understanding of the purpose, foundation, character, intention and function of the statutory regulation on the concurrence of offences.
With *purpose* we refer to the reason or reasons which formed the foundations of the regulation or parts of it.
With *foundation* we mean the basic principles of criminal law, which form the basis for the regulation.
The *character* of the regulation refers to the nature of the statutory regulation, in particular to what extent the composition of the regulation is uniform or diverse.
The *intention* describes the consequences that the application of the regulation has on the sentence that is to be imposed.
The *function* of the regulation points to the functioning of the regulation in practice.
In this summary the purpose, foundation, character, intention and function will be referred to as much as possible.

Chapter 2 describes the historical development of the Dutch statutory regulation on the concurrence of offences. The Code of Criminal Procedure from 1838 already contained a regulation on the concurrence of offences. The regulation was moved to the Criminal Code, when the criminal code of 1886 was introduced. There was a choice made for an absorption system in the Code of Criminal Procedure from 1838 (one sentence will be pronounced for all criminal offences, the sentence is not higher than the highest statutory maximum ordered for one of the offences). This absorption system was replaced by a system of moderate accumulation in 1886 (article 57 paragraph 2 and article 58 of the Dutch Criminal Code). It is an accumulation system because every offence is punished separately. But there is no unlimited or absolute accumulation possible, because the maximum accumulation is limited by the highest statutory maximum laid down for one of the offences, increased by maximum one third of the maximum sentence. What did the legislator think about the purpose, foundation, character and intention of the regulation?

The legislator is of the opinion that the purpose of the regulation is to guarantee proportional sentencing, for imprisonment as well as for financial penalties. The legislator's idea was that guilt was not doubled but raised with each newly committed offence.

The foundation of the regulation on the concurrence of crimes is primarily retribution. This is different for minor offences in which case prevention is chosen for as a foundation, because of the principle of strict liability.

The legislator has chosen for unlimited accumulation instead of limited accumulation in cases of concurrence of minor offences (art. 62). However, the accumulation of alternative detention is also limited for minor offences. As it turns out, the legislator has not chosen for a uniform system. The system is very varied. The legislator has chosen to deviate from the system of limited accumulation for life imprisonment and additional sentences, varying from absorption to total accumulation (art. 59 and 60).

Nevertheless, the legislator was of the opinion that the intention of the statutory regulation on the concurrence of offences was to increase the sentence: the applicable sentence can be increased (even doubled for minor offences), but the increase for serious offences is limited by the law.

What is important is that the legislator does not force the judge to increase the sentence; the regulation gives the judge the possibility of increasing the sentences and binds him (for serious offences and alternative detention) to a maximum. The judge is otherwise free in the application of the sentence. This relative freedom is characteristic for the whole Dutch Criminal Code.

If established by the law, the regulation on the concurrence of offences is also applicable in cases of non-simultaneous trials (art. 63). The purpose of this regulation is dual.

First of all preventing disproportional sentencing is important for concurrence of offences in cases of non-simultaneous trials, as well as in cases of simultaneous trials.
Besides this, article 63 aims to prevent non-simultaneous trials as much as possible. Offences which can be judged simultaneously must be judged simultaneously as much as possible. Nevertheless, when a simultaneous trial is not possible, the regulation on the concurrence of offences must still be applied.

In the course of history various parts of the statutory regulation on the concurrence of offences have been changed. An important change was the implementation of absolute accumulation of fines for serious offences, by implementation of the Law for Financial Penalties in 1983. The requirement for proportional sentencing was not abandoned, but moved to article 24 of the Criminal Code (the ability-to-pay principle), which is also applicable in cases of concurrence of offences.
The changes to article 63 of the Criminal Code did not have the intention to change the purpose, foundation, intention or character of the regulation, but were intended to clarify article 63 and to make it applicable on the punitive order (article 257a e.v. Code of Criminal Procedure).
At the end of chapter 2 some recent initiatives on amending the law are discussed. The amendments propose fundamental changes to the existing regulation. The parliament has not (yet) discussed the amendments with respect to the content.

In *chapter 3*, the jurisprudence of the Dutch Supreme Court with respect to the concurrence of offences is analysed. Most of the jurisprudence of the Supreme Court affects the regulation of articles 57 and 63 of the criminal code.
The judgement '*Oude Kijk in 't Jatstraat*' has led to a flow of jurisprudence by the Supreme Court, in which the balance between *concursus idealis* (art. 55) and *concursus realis* (art. 57) is developed to the advantage of the latter. We mean *concursus realis* when the intent of several committed offences differ. The sentencing possibility for the judge increases, which can be seen as a disadvantage for the defendant. For *concursus idealis* the absorption system is applicable, the maximum sentence is lower than in a case of *concursus realis*. For a long time, the Supreme Court clung to the strict interpretation of the doctrine introduced in the judgement '*Oude Kijk in 't Jatstraat'*. In recent years, the facts of a case have become more relevant for the answer to the question whether there is *concursus idealis* or *realis*, to the advantage of *concursus idealis*.
Moreover, early in the twentieth century, the balance between the continued act (art. 56) and *concursus realis* has changed to the advantage of the latter. That has also increased the sentencing possibility for the judge, as the legislator has chosen an absorption system for the continued act also.

The Supreme Court had to clarify several aspects of article 63.
In the first place, according to the Supreme Court it is not essential that several offences could have been judged simultaneously for Article 63. This Article is also applicable when the person is judged

for another offence in the period between the moment he committed the crime and the moment he was judged for that crime. It is not necessary that the earlier imposed sentence is final and conclusive. The reach of article 63 is considerably broadened by this. The Supreme Court puts the emphasis on the first aim of article 63 (preventing disproportional sentencing). The second aim (preventing non-simultaneous trials) has become less important.

In the second place, the Supreme Court has given its opinion on the intention of article 63. A discussion arose in legal practice around the question whether article 63 was increasing or decreasing the sentences. The Supreme Court explained that article 63 does not automatically have a decreasing effect. The result of applying article 63 can be that the sentence will be reduced, but a defendant cannot claim a right to it. The application of article 63 can result in an increased sentence, as long as the maximum sentence is not reached. The main thing is that the sentence will be reduced. The judge, who applies article 63, has to consider earlier sentences which were imposed by other judges. Besides, the judge who is imposing article 63 cannot sentence higher than the maximum imprisonment laid down for the committed offence. From that it follows that when an offence is judged for which no life imprisonment is laid down, while on an earlier offence it was, the judge who is applying article 63 may not impose a life imprisonment.

In the third place, the Supreme Court has to decide how article 63 should be applied. Two ways are described: the application *in concreto* (or application in a particular case) and the application *in abstracto* (or application in theory). The application *in concreto* amounts to the situation that even when the sentence does not reach the maximum, application of article 63 has to lead to a reduced sentence. Included under this is the choice for another type of sentence, sentence modality or, in the worst case, to pronounce the defendant guilty without punishment (an earlier pronounced criminal measure is not relevant for the application of article 63). Application *in abstracto* means the judge is free to determine the sentence, as long as the maximum sentence (as stated in article 63) is not reached. This means that in a concrete case, that in principle, article 63 has no influence on the duration of the sentence, the type of the sentence and the modality of the sentence. The Supreme Court has not chosen clearly for either type of application. It has determined, in application of article 63, that the judge has to pass a sentence that does not prejudice the rights of the defendant. This means that the defendant cannot come into a more adverse situation, than he would when the trial of both offences took place simultaneously.

In *chapter 4*, literature on concurrence of offences written by Dutch criminal law scientists is analysed. Although some authors cast doubt on the benefit of the regulation on the concurrence of offences, for the reason that the judge will be influenced by more than one offence in pronouncing the sentence, most authors are of the opinion that the regulation is important. With regard to the principle of legality, the legislator has to stipulate the outlines, as much as possible, for a coherent statutory regulation, but it is realized that the prosecution and the judges have a role in fulfilling the regulation.

A development with respect to the purpose and the foundation of the concurrence of offences is also visible. The argument, based on retribution, that guilt is not doubled but increased, is less prominent nowadays. The purpose of the regulation on the concurrence of offences (including article 63) is primarily to prevent disproportional sentencing.
Moreover, the foundation of the regulation for concurrence of crimes has changed. Although the notion of retribution has not disappeared, judging by the principle of proportionality, there is more room available for prevention. The intended purpose was initially to discuss the desirability of increasing the maximum sentence for concurrence. These days, there also is debate on extending the maximum sentence for concurrence of offences, with regard to prevention.

The question as to what extent prevention could serve as a foundation for concurrence of crimes is also questioned because of the connection, recognized in the literature, between concurrence of offences and recidivism. In both cases, the defendant commits more than one offence. The difference between recidivism and concurrence is that in a case of recidivism there is an irrevocable conviction before the defendant commits another offence. The irrevocable conviction works as a warning, something that is missing from the concurrence of offences.
Besides, there is little discussion about the sentence increasing intention of the regulation for recidivism, while there is a lot of debate on the sentence increasing intention of concurrence. The legislator presumes concurrence has a sentence increasing intent (see art. 10 sub 3), but this is disputed in the literature. Quite a lot of authors think concurrence has a sentence decreasing effect. In cases of concurrence of offences, it is a matter of 'bulk discount'; more offences do not bring about an accumulation of sentences, but bring a total moderate sentence. In these circumstances, the connection between concurrence and recidivism is minor. Authors who are of the opinion that concurrence is a regulation which increases the sentence, see a closer connection between concurrence and recidivism. These authors plead for a strengthening of the connection by distinguishing prevention as the foundation of concurrence, without abandoning the proportional retribution as a foundation.

The varied system of concurrence has been the subject of discussion. Is more diversification required or must, for example, the differences between sentence type and between crimes and minor offences be terminated? Several proposals for change are given in the literature, such as variation between concurrence of two offences and concurrence of more than two offences, or variation between types of offenders (whereby the maximum sentence for habitual offenders will be increased).
The question has also been raised whether judges have to sentence each offence separately, as is done for minor offences, or that the regulation for crimes should be the guiding lead and also be applied to minor offences. With regard to that debate is has been proposed to apply the system of moderate accumulation for fines and community service.

In recent years, article 63 has received a lot of attention. Roughly speaking there are three subjects under discussion in the literature: 1) the purpose of article 63, 2) the question which intervening convictions have to be taken into account, and 3) to what extent article 63 has to be applied *in concreto* or *in abstracto.*

Ad 1) It is also recognized in the literature that the second purpose of concurrence has devalued in importance. This comes from the broad interpretation of article 63 and is not embraced by everyone.

Ad 2) The question which intervening convictions have to be charged and which not, has led to some debate. This debate is a topical subject as a result of several judgements made by the Supreme Court. Some authors plead not to charge all intervening convictions when applying article 63, and to acknowledge a censure regulation like the German Criminal Code does, or plead to charge just the intervening convictions which are not yet executed, out of date or remitted.

Ad 3) The question whether article 63 must be applied *in concreto* or *in abstracto*, is answered in various ways. Some authors see article 63 as a 'sentence maximum limiter' and means that the judge is free to determine the sentence within the maximum. Other authors see more benefits from an application *in concreto* and attach an obligation to motivate its use.

Application of article 63 should in these cases be motivated more by the judge, despite the fact that there is no statutory obligation to motivate since 1993. In his motivation, the judge can indicate the grounds for moderating the sentence and the way he has taken previous conviction(s) into account.

At the end of chapter 4 Article 13 of the Dutch Criminal Code is discussed. This regulation is not a part of the regulation of concurrence, but looks like a type of concurrence. Article 13 prescribes that in some cases when one-third of the imposed sentence is served, that in some cases it can be decided that the convicted defendant can serve the rest of the sentence in a judicial institution for forensic psychiatric treatment. In that case, the imprisonment will be converted into an involuntary commitment. If the defendant is convicted to imprisonment and involuntary commitment, it looks like the imprisonment is absorbed by the involuntary commitment. In theory, this does not happen, as the convicted defendant can be returned to prison to serve the rest of his sentence. However, it is unclear whether the time spent in the institution for forensic psychiatric treatment will be subtracted from the time the convict has to serve in prison. If that is the case, then there is absorption.

In *chapter 5* the practice of the law is analysed. This research consists of two parts.

In the first place the judgements of district courts and higher courts in 2008, 2010 and 2012 are analysed. The amount of cases (of judgements published on rechtspraak.nl) where article 63 was declared as applicable are analyzed and also in which cases the application of article 63 was motivated. Results show that article 63 is not motivated in the vast majority of judgements. When application of article 63 is motivated, it turned out that the judge felt limited by the regulation of concurrence in some cases. The limitation was connected with the maximum sentence (in some cases,

the application of article 63 led to a maximum sentence which was not in accordance with the gravity of the offences), but seemed to be connected to earlier imposed measures or conditions by another judge, which the judge who applied article 63 could not thwart.

In the second place, interviews have been carried-out with members of the judiciary, the prosecution and the criminal law bar. The purpose of this part of the research is to get a thorough description of the experiences and opinions of several professional groups within the legal practice system without aiming for an exact quantitative representation.

From the interviews it transpired that in many cases there is concurrence of offences, but this concurrence is not often debated during trial. This is different when article 63 is applied. This article is under discussion in a lot of cases and often brings debate on the duration of the imposed sentence, and sometimes on the type of sentence and the modality. To apply article 63 in a right way, up to date judicial documentation is essential.

The question to what extent article 63 (and the regulation on the concurrence of offences in general) has an actual effect on the sentence depends on whether the application of article 63 is done *in concreto* or *in abstracto*. The application *in concreto* is mentioned most often. The application *in abstracto* seems to be used when there is a guideline or point of reference for the judged offence. In that case, there is in principle an accumulation of the sentences which are pronounced in the guideline or point of reference.

There are different opinions on the desirability of this. That can be explained by the difference in purpose of the regulation: guaranteeing proportional sentencing or being a 'sentence maximum limiter'. In the first case, one is of the opinion that also inside the maximum sentence there has to be a moderation of the sentence (bulk discount), and in the second case, the sentence can accumulate as long as the maximum sentence is not reached.

We see in the first case that prevention (in the sense of rehabilitation) is particularly pronounced as the foundation for concurrence. Prevention has the meaning of limitation of the sentence in a concrete case. All this makes it clear that the intent of concurrence is moderation of the sentence. This is not obvious when approached in a more abstract way.

The existing regulation of concurrence is hardly seen as an obstruction. The need to change the regulation was mentioned by only a small minority of respondents. That does not alter the fact that some developments were mentioned that call for awareness.

In the first place, cold cases were given as a reason to change article 63. Such cases are so special, that the existing regulation of article 63 hinders a good judgement. The case of the district court of Amsterdam is not seen as a unique case.

In the second place, although less explicit, the increasing role of the victim in criminal procedures is mentioned as a reason to adapt the current statutory regulation. The victim (or the surviving relative)

will not just accept a decreased sentence caused by the application of article 63, and more in general, the question whether the victim who has the opportunity to recommend a sentence during the court hearing, accepts a regulation which leads to a bulk discount because the defendant has committed more than one crime is questionable.
In the third place, the continued appeal is mentioned as a reason to make the sentence for each offence in a judgement clearer. Although there are objections to splitting the sentence {practical difficulties in realizing (also because of work pressure), a danger for increased sentences and mistakenly looking at imposing a sentence as a simple sum}, the split-up of sentences is also supported as being useful for the victim, society, the defendant and for the judge in appeal. It must be noted that splitting the sentence for all committed offences is not necessary in all cases.

In *chapter 6* the statutory regulation in some of the neighbouring countries are analysed. From a QuickScan we choose to do research on the regulation in Germany, England and Wales, Finland, France, Austria and Spain. Research was done on the statutory regulations and criticism of the regulations. The practice (function) of the statutory regulation is beyond the scope of this research. A regulation on concurrence exists in all the analysed countries.
There are clear differences between the countries, as well as differences with the Dutch regulation. In Germany they have chosen for an absorption system (same as in Austria), and in France, Finland and Spain they have chosen for an accumulation system (which strongly differ from each other), while in England and Wales concurrence does not come up in imposing the sentence, but during the execution of the sentence. In Spain there is a system of pure accumulation, but the law regulates that the sentence enforced is subject to a maximum.
At the same time, it was noted that, despite the differences, the purpose and foundation of the regulations do not differ much from each other (and do not differ from the Dutch regulation). In all countries the aim is to prevent disproportional sentencing and serve (in particular) retribution and (to a lesser extent) prevention as a foundation for the regulation.
Moreover, the character of the regulation is just as varied in many of the countries as it is in the Netherlands. For example, there is a distinction made between several types of crimes (France), or a distinction is based on the maximum sentence which is laid down for an offence (Finland). In England, Wales and Germany judges are required to motivate the sentence they impose in cases of concurrence of offences. Also in Finland and France the law prescribes which factors have to be taken into account when sentencing (in cases of concurrence).
Even though the judge, in several systems, including the Netherlands, has a lot of freedom in determining the sentence, the sentencing maximum is in many countries comparatively lower than in the Netherlands. In France and Austria, it is not permitted to sentence higher than the highest maximum sentence. Finland has chosen for a differentiated system. England, Wales and Spain apply the system of absolute accumulation, every offence is sentenced, but the execution of the sentence is

limited by the judge (Engeland and Wales) or by the law (Spain), while the sentencing range seems to be higher than in the Netherlands.
To what extent the regulation has an increasing or decreasing effect, is different for every country. In Austria and Finland the regulation has a decreasing effect on the sentence. There is some debate on the sentencing maximum and the decreasing intention of the regulation. Particularly recidivists and habitual offenders would benefit from a limited sentencing maximum. Besides, there is a risk that offences are not punished.

An application of concurrence in cases of non-simultaneous trials exists in most of the countries. The German and Austrian regulations limit the application thereof, to prevent 'double favour' and only apply the regulation if a simultaneous trial was practically possible. Spain has this limitation also. In France, the regulation for concurrence in cases of non-simultaneous trials is applied only when the earlier judgement is not yet irrevocable.
Whether there is an application of the regulation *in abstracto* or *in concreto* is not always clear. In Austria they seem to have chosen for an application of the regulation *in concreto*, like in France and Germany where the judge has to decide which sentence he would have imposed when the offences were tried simultaneously. The judge can decide to mix the sentences (France) or to overrule the earlier imposed sentences and to sentence once again (Germany).

In *chapter 7*, we give our conclusions with regard to the purpose, foundation, character, intention and function of the concurrence of offences. Besides, we give four recommendations.
1) In cases of the concurrence of offences, the judge, in his sentencing motivation, should split-up the sentence in some cases for each offence (or group of offences). Splitting the sentence is not always necessary, but can in some cases be desirable. The prosecution and the judiciary can further give structure to the splitting of sentences in their policies (in the demand for a sentence, judgement).
2) By stipulating the amount of a fine in cases of concurrence of minor offences and crimes, the judge has to take the ability-to-pay principle into account. The present impression is that, as a consequence of policies, fines are often accumulated, without having regard to the financial resources of the defendant. This is at odds with the established principle in article 24 of the Dutch Criminal Code, which also has to be applied in cases of concurrence.
3) In principle, the current article 63 does not have to be changed, but the application of the article must be explained explicitly by the prosecution and the judge when the interests of the defendant, to a large extent, are at stake. A choice for the application of article 63 *in abstracto* or *in concreto* is not made in this research. We leave this choice to legal practice. However, the judge must, in accordance with the jurisprudence of the Supreme Court, clearly expand on the sentence he imposes, in cases where the interests of the defendant are at stake. In such cases, it is not sufficient to only mention earlier convictions, or only to cite article 63 in the relevant statutory regulations.

4) Consideration could be given to adding a second paragraph to article 63, which would prescribe that for cold cases there is no application or limited application of article 63. In recent years, we see in the field of the legislator an increasing tendency to track down offenders for longer periods and prosecute them for offences which were committed in the past (abolition of prescriptive periods), just as we see more often and in more cases that under special circumstances closed cases are reopened (introduction of the regulation of revision to the disadvantage of the defendant).

Article 63 of the criminal code has not yet been adapted to these new developments. Article 63 can be a hindrance for imposing a just sentence in cases of cold cases, very serious offences (where a maximum sentence of more than twelve years imprisonment is laid down) which could not be solved in earlier criminal investigations, but through new information, which was not available at the time of the earlier investigation, that can lead to imposing imprisonment.

With respect to the earlier mentioned developments, but also taking into consideration the opinion of the legal practice, a supplement to article 63 is conceivable. In the event that this is chosen for, the insertion of an obligatory special legislative motivation is obvious.