



# RESEARCH NOTE

## RESEARCH AND DOCUMENTATION DIRECTORATE

Legal regime and classification of the suspension of the enforcement of a custodial sentence

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[...]

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## INTRODUCTION

1. The Research and Documentation Directorate (RDD) was requested to draw up a research note on the classification and procedural position of suspension of the enforcement of custodial sentences in the laws of the Member States, in light of Framework Decision 2008/909/JHA<sup>1</sup> ('the Framework Decision').
2. Specifically, this research note aims to answer the question of whether ordering the suspension of the enforcement of a custodial sentence forms part of the sentencing judgment itself, or whether it falls within the scope of the enforcement of that sentence.
3. The purpose of that question is to determine the scope of the competences available to the authorities of a Member State when recognising and enforcing a judgment in criminal matters issued by the authorities of another Member State, when that judgment imposes a custodial sentence.
4. According to Article 8(1) of the Framework Decision, the competent authority of the executing State shall recognise a judgment which has been forwarded to it and shall forthwith take all the necessary measures for the enforcement of the sentence. In addition, according to Article 17(1) of the same Framework Decision, the enforcement of a sentence shall be governed by the law of the executing State and the authorities of the executing State alone shall be competent to decide on the procedures for enforcement and to determine all the measures relating thereto.
5. Therefore, were the suspension of enforcement to be regarded as a procedure for enforcement of a custodial sentence within the meaning of Article 17 of the Framework Decision, the authorities of the executing State could suspend the enforcement of the custodial sentence in respect of the sentenced person, in accordance with the procedures laid down by national law. On the contrary, if the suspension were to be regarded as being connected to the sentencing

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<sup>1</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

judgment itself (and not to its enforcement), the authorities of the executing Member State would not be able to order the suspension of the custodial sentence subsequently, and would therefore have to enforce the sentence as passed in that judgment, in accordance with Article 8 of the Framework Decision.

6. In order to answer this question, a summary table has been created for a sample of Member States' legal systems (**Bulgaria, Croatia, Denmark, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovakia and Spain**) covering the following aspects: <sup>2</sup>
  - the procedures for suspending the enforcement of a custodial sentence (e.g. 'simple' suspension, with or without requirements for the sentenced person, etc.);
  - the conditions for suspending a sentence (legal conditions and/or circumstances to be taken into account by the court);
  - the procedural stage at which suspension may be ordered;
  - the authority that is competent to order the suspension; and
  - how suspension is classified.
  
7. As a preliminary point, it should be noted that this research note focuses on suspension in the strict sense [...]. 'Suspension in the strict sense' is understood to mean a measure suspending a custodial sentence, <sup>3</sup> which allows, under certain conditions, the sentenced person never to serve their sentence in prison. Such suspension differs from any temporary suspension measures provided for, as the case may be, in the laws of the Member States, whereby the sentenced person may temporarily postpone the start of the enforcement of his or her sentence or benefit from temporary release while serving that sentence, due to circumstances such as, for

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<sup>2</sup> The summary tables covering each of these Member States are inserted below.

<sup>3</sup> Further, this research note pertains only to the suspending of a custodial sentence. [...].

example, illness or professional obligations, following which the person would return to prison to resume serving their sentence).<sup>4</sup>

8. In addition, this research note does not cover early release or conditional release, since it is clear from Article 17(1) of the Framework Decision that those measures constitute procedures for enforcement of the sentence.
9. Having set out the above, it should be noted that this research has found that in the various legal systems studied, suspension follows a similar legal framework and has the same meaning.

## I. PROCEDURES FOR SUSPENSION

10. In each of the legal systems analysed, suspension is defined as a measure that is taken to definitively suspend the enforcement of a custodial sentence, subject, in some jurisdictions, to the sentenced person complying with certain conditions. In that regard, some legal systems provide for only one form of suspension, while others distinguish between different types of suspension.
11. Where there are different types of suspension, these are based on different criteria, depending on the legal system. For example, **Spanish** law provides for four types of suspension, applicable according to the circumstances of the sentenced person: ordinary suspension, exceptional suspension, extraordinary suspension for persons dependent on substances and extraordinary humanitarian

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<sup>4</sup> For example, under **Bulgarian** law, the Code of Criminal Procedure provides for the suspension (*spirane*) and interruption (*prekasvane*) of the enforcement of the sentence (Articles 415 and 433 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure)). The grounds for applying these two measures include the serious illness of the sentenced person, the prisoner's pregnancy or childbirth, completion of a current school year or taking an examination. Unlike decisions on the suspension of enforcement of a prison sentence, decisions on the temporary suspension or interruption of the enforcement of a custodial sentence fall within the competence of the Public Prosecutor's Office and are taken at the enforcement stage of the sentence. Similarly, in the **Netherlands**, Article 6:2:3 of the Wetboek van Strafvordering (Code of Criminal Procedure) provides for suspension on account of mental illness: if, after the custodial sentence has been imposed, but before the start of enforcement of the sentence, the sentenced person starts suffering from mental illness, the court which imposed the sentence may order the suspension of its enforcement. Once the sentenced person has recovered, the suspension order will be revoked. Furthermore, under Article 6:2:4 of the Netherlands Code of Criminal Procedure, an exceptional suspension may be ordered, under which, in exceptional cases and for a period not exceeding that which is necessary (at least 2 days and not more than 3 months), enforcement of the custodial sentence may be suspended to allow the sentenced person to temporarily leave prison.

suspension. In **France, Luxembourg** and **Slovakia**, two types of suspension are provided for, 'simple' suspension (*sursis simple*) and suspension with probation, depending on whether or not specific conditions have been imposed on the sentenced person. The same criterion governs the distinction between the various types of suspension in **Portugal**, where criminal law provides for 'simple' suspension, suspension contingent upon the fulfilment of obligations, suspension with rules of conduct attached and suspension with probation.

12. Although suspension may thus take different forms depending on the legal system, all legal systems do have some form of suspension accompanied by the imposition of specific conditions beyond the general obligation not to commit further offences during the period referred to as the 'probation period' or 'probationary period'. Those specific obligations might be, for example, a prohibition on going to a particular place, an obligation to seek treatment or an obligation to work.
13. Furthermore, while some legal systems provide only for the possibility of suspending the enforcement of the entire custodial sentence (**Bulgaria, Finland, Hungary, Poland, Portugal, Slovakia** and **Spain**), others allow for the suspension of part of the sentence (**Croatia, Denmark, France, Greece, Ireland, Lithuania, Luxembourg** and the **Netherlands**).
14. All the legal systems analysed specify the circumstances in which the suspension may or must be revoked. Most of them distinguish between mandatory and discretionary revocation. They regard revocation to be mandatory if the sentenced person commits a new offence during the probation period. The new offending is defined in precise terms and differs between the jurisdictions examined. For example, **Croatian** law requires, for the revocation of the suspension, a conviction for one or more offences for which a custodial sentence of more than one year has been imposed. By contrast, under **Polish** law, the suspension will be revoked if the sentenced person has committed a similar intentional offence for which a prison sentence has been handed down, which has become final.

## II. CONDITIONS FOR SUSPENDING A SENTENCE

15. With regards to the conditions for suspending a sentence, this research has found that, in principle, in the States covered by this study, suspension is reserved for custodial sentences not exceeding a certain duration. Also included in the conditions laid down in several of the legal systems analysed (**Bulgaria, Denmark, France,**<sup>5</sup> **Greece,**<sup>6</sup> **Poland** and **Spain**<sup>7</sup>) is the requirement of no previous convictions, although specific requirements relating to previously prosecuted offences may apply in that regard.<sup>8</sup> In addition, in the case of **Croatia** and **Finland**, although having a previous conviction is not an obstacle to the sentence being suspended, the criminal legislation in those Member States expressly provides that that is one of the circumstances the court ruling on the suspension must take into account, as stated in the next paragraph.
16. Further, when making a ruling on suspension, the court usually takes into account several subjective factors relating to the offender<sup>9</sup> in order to assess whether the objectives of the sentence will be achieved without the sentenced person actually serving the custodial sentence imposed (or where that person serves only part of that sentence, in the case of legal systems providing for the possibility of a partial suspended sentence).<sup>10</sup> Of all the sentencing objectives, the most important is individual deterrence, which aims to deter the offender from committing another offence (prevention of recidivism).

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<sup>5</sup> In **France**, this condition applies only in the case of 'simple' suspension. More specifically, a sentence to a period of imprisonment in the last five years precludes such a suspension.

<sup>6</sup> In **Greece**, the person must not have been previously sentenced to a custodial sentence of more than one year.

<sup>7</sup> In **Spain**, that condition applies only in the case of ordinary suspension (with the exception, however, of offences committed through carelessness, minor offences, criminal records which no longer appear in the criminal record within the meaning of Article 136 of the Código Penal (Criminal Code), and offences which are not relevant for assessing the commission of new offences).

<sup>8</sup> By way of example, in **Bulgaria**, imprisonment for an intentional criminal offence subject to public prosecution and, in **Denmark**, a suspended or unconditional prison sentence for a similar offence, precludes the sentence being suspended.

<sup>9</sup> As regards those circumstances, one example is the way in which the sentenced person lives, the extent of that person's culpability, the circumstances in which the offence was committed or the behaviour of the sentenced person after it was committed.

<sup>10</sup> The taking into account of those factors is either directly provided for in criminal legislation (**Bulgaria, Croatia, Denmark, Finland, France, Hungary, Ireland, Lithuania, Poland** and **Portugal, Spain**) or confirmed by legal literature (**Hungary, the Netherlands** and **Slovakia**).

In that regard, in some legal systems, the taking into account, when suspending the enforcement of the custodial sentence, of the objective of individual deterrence is expressly mentioned <sup>11</sup> (**Greece**, the **Netherlands**, **Poland** and **Portugal**). It is in the light of this objective that suspension is, in principle, revoked if the person sentenced to a suspended custodial sentence commits a new offence during the probation period, although additional conditions for revocation of the suspension may apply in that regard, depending on the legal system. <sup>12</sup> Thus, the enforcement of the custodial sentence has proved necessary, since the purpose of the sentence has not been achieved through the suspension.

17. Although, in principle, it is subjective factors relating to the offender that underpin the use of suspended custodial sentences, in some legal systems, general deterrence objectives are also referred to (**Bulgaria**, **Hungary**, **Ireland**, the **Netherlands**, **Poland** and **Portugal** <sup>13</sup>). Since the main aim of general prevention is to deter members of society from committing offences, the application of a suspended custodial sentence should not give the public the impression that the offender essentially remains unpunished.

### III. PROCEDURAL STAGE

18. With regard to the stage of the procedure at which suspension may be ordered, it is apparent from this study that, **in all the legal systems, suspension is, in principle, ordered during the sentencing stage, in the sentencing judgment.**

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<sup>11</sup> Under **Greek** law, the Criminal Code provides that suspension of the enforcement of a custodial sentence may be granted if the court considers, giving its reasons, that the enforcement of the sentence is not necessary to prevent the sentenced person from committing new criminal offences. In the **Netherlands**, taking into account the objective of individual deterrence is emphasised in legal literature and, in **Poland** and **Portugal**, in case-law.

<sup>12</sup> For example, in **Poland**, the revocation of the suspension is mandatory where, during the probationary period, the sentenced person has committed a similar intentional offence for which a final prison sentence has been imposed. By contrast, suspension may be granted where the sentenced person has committed an offence which does not lead to mandatory revocation.

<sup>13</sup> In those legal systems, general deterrence considerations are set out in legal literature (**Hungary** and the **Netherlands**) or in case-law (**Bulgaria**, **Ireland**, **Poland** and **Portugal**).

19. Two legal systems (**Spain** and **France**) also allow suspension to be ordered after the sentencing stage. In those two legal systems, as in the other Member States, suspended sentences are, in principle, imposed during the sentencing stage, but may also be ordered, in specific cases, after the sentencing judgment has been handed down.
20. Thus, in **Spain**, although, as a general rule and whenever possible, suspension is ruled on in the sentencing judgment, it can still be ordered during the enforcement stage, without undue delay, where it was not possible for the judge to rule on it in the original sentencing judgment.<sup>14</sup>
21. In **France**, if suspension was not ordered at the sentencing stage, the judge responsible for the enforcement of sentences, who becomes involved at the stage of enforcing the judgment, has the option of imposing specific forms of suspension, where the sentence is less than six months, under a specific procedure known as 'conversion of a sentence'.<sup>15</sup>

#### IV. COMPETENT AUTHORITY

22. In terms of the authority that is competent to suspend a sentence, this study has found that, **in all the legal systems examined, suspension is, in principle, ordered by the same authority that handed down the sentence, and in the same judgment.**
23. In **Spain**, where there is a possibility that the suspension may be ordered after the sentencing stage, the fact remains that it will be the same judge or court that handed down the sentencing judgment that will also order the suspension.
24. On the other hand, in **France**, when suspension is ordered at the stage of enforcing the judgment in the context of the 'conversion of a sentence' procedure, it is ordered by the judge responsible for the enforcement of sentences, who is different from the sentencing judge.

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<sup>14</sup> The circumstances in which the judge did not have the opportunity to rule on the suspension in the judgment are not limited by either the Criminal Code or the case-law. It applies generally to any situation in which suspension was simply not ordered in the judgment.

<sup>15</sup> [Article 747-1 of the Code of Criminal Procedure.](#)

## V. CLASSIFICATION OF THE SUSPENSION

### A. MEMBER STATES THAT REGARD SUSPENSION AS AN INTEGRAL PART OF THE SENTENCING JUDGMENT

25. For the majority of the legal systems analysed (**Bulgaria, Croatia, Denmark, Finland, Greece, Hungary, Ireland, the Netherlands, Poland, Portugal** and **Slovakia**), the suspension of the sentence would fall within the scope of the sentence, and therefore would not constitute a measure for the enforcement of the custodial sentence. This may be explained by the procedural similarity between the imposition of a custodial sentence and the suspension of the sentence (the suspension being given in the same judgment as the sentence and by the same court).
26. Within that group of legal systems, **Finland** and **Ireland** appear to accord suspended sentences a special status. Under **Finnish** law, suspended custodial sentences constitute a separate category of sentence in its own right, in the same way as, inter alia, the deprivation of liberty or a fine. Similarly, under **Irish** law, a suspended sentence and a deferred sentence are each considered to be specific penalties, equivalent to custodial sentences, which are imposed according to the circumstances of the case and the seriousness of the offence.
27. In the other legal systems in this group, suspension is rather a specific form of penalty that is 'attached' to a custodial sentence, without, however, constituting, in the strict sense, a type of sanction in its own right. In some of them, suspension is defined as an alternative to imprisonment (**Hungary** and **Slovakia**). Similarly, in **Portugal**, the suspension of the enforcement of a custodial sentence constitutes an alternative sanction to imprisonment which does not involve the deprivation of liberty.
28. Furthermore, in some legal systems, the stages of determining the duration of the custodial sentence and of ordering the suspension appear to be two clearly distinct stages in the decision-making on sentencing. Thus, in **Hungary**, the Criminal Code<sup>16</sup> provides that when a court imposes a custodial sentence, it is required to determine the

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<sup>16</sup> Büntető törvénykönyv.

duration of the sentence, regardless of whether the sentence may be suspended. That provision is intended to prevent the practice whereby suspension, which could be perceived as removing the sentence, is, in order for the sentence to retain its punitive nature, to a certain extent 'offset' by the imposition of a longer custodial sentence. In **Lithuania**, the court applies the principle that penalties must be specific to the offender– in two ways. First, taking into account all relevant circumstances, it chooses the most appropriate penalty for achieving the objectives of the sentence. Second, the court reassesses those circumstances in order to decide whether the objectives of the sentence would be achieved without the sentence actually being served.<sup>17</sup> In any event, in this group of legal systems, which considers that suspension of the sentence is part of the sentencing judgment, suspension is ordered only after analysing the individual characteristics of the offender and of the offence committed, in accordance with the principle of individualisation, which must guide the court in its assessment.

#### B. MEMBER STATES THAT REGARD SUSPENSION AS A PROCEDURE FOR ENFORCING A CUSTODIAL SENTENCE

29. In comparison with that first group of legal systems, **Spain** and **France** consider that suspension would instead constitute a procedure for enforcing a custodial sentence.<sup>18</sup>
30. In **Spain**, suspension would be regarded as a procedure for enforcing a custodial sentence, despite being ordered, in principle, in the same sentencing judgment and by the same authority as that which imposed the sentence.
31. Similarly, in **France**, suspension is, in principle, ordered directly in the sentencing judgment and therefore by the same judge, but legal literature nevertheless regards it as a 'means of early enforcement' at the judgment stage, despite the fact that suspension is ordered in the light of the same factors as those taken into account when imposing

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<sup>17</sup> Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), judgment of 24 October 2024, No. 2K-7-119-719/2024.

<sup>18</sup> It should be noted that in **Lithuania**, although suspension of enforcement is also conceivable as an exceptional procedure for enforcing a sentence of imprisonment, it nevertheless forms an integral part of the sentencing judgment itself.

the sentence, in accordance with the principle that penalties must be specific to the offender.

32. In the case of those two legal systems (**Spain** and **France**), there is therefore somewhat of a disconnect between the classification of the suspension and the formal procedures for ordering it. In other words, for those legal systems, the law on the enforcement of sentences is not confined to the sentence enforcement stage of the procedure, which necessarily occurs after the judgment stage, but may apply from the judgment stage onwards.
33. Nevertheless, it should be noted that, in those two legal systems, suspension may still be ordered after the judgment stage, thus during the sentence enforcement stage, which may justify the classification of the suspension as a procedure for enforcing a custodial sentence.

#### C. THE PARTICULAR SITUATION IN LUXEMBOURG, WHERE SUSPENSION IS REGARDED AS A GENUINE RIGHT

34. Lastly, emphasis should be given to the particular situation in **Luxembourg**, where suspension of a custodial sentence is regarded as a genuine right of the sentenced person, under certain conditions, and not as a specific form of sentence or procedure for its enforcement.

[...]