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# The Legal 500 Country Comparative Guides

## Finland

# LENDING & SECURED FINANCE

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Finland.

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## FINLAND

# LENDING & SECURED FINANCE



### 1. Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Foreign lenders may require a license/passport in order to be able to lend into Finland. Where the loan is provided by a licensed credit institution or investment firm or another regulated entity (with their home state in either non-EEA or EEA jurisdictions), the lending activity must be included in the scope of its licence and passported into Finland, as applicable. On the other hand, if a loan is provided by an unregulated entity, lending does not require a licence in Finland. This applies for unregulated entities with their home state in either non-EEA or EEA jurisdictions when lending to corporates. Lending to consumers does, however, require completing a registration.

However, lending into Finland or taking the benefit of security without the lender having solicited an entity in Finland does not trigger the licensing requirements. Accordingly, it is possible to have Finnish borrowers and/or guarantors and to take security from Finland without triggering the licensing requirements.

### 2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

Not as such. However, the Criminal Code includes a general prohibition against usury in lending. The Consumer Protection Act further includes specific restrictions on interest that may be charged on consumer loans.

### 3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the

### repayment of principal, interest or fees in foreign currency from, your jurisdiction?

No, subject to anti-money laundering rules and sanctions.

### 4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction.

Yes, security can be taken over all of the above types of assets. The appropriate procedure depends on the type of asset in question.

Security over real property (freehold and certain leaseholds) is created by registering the mortgage with the National Land Survey of Finland. The registrar will register the real estate mortgage on an electronic register. Previously, in order to create security over real property, physical real estate mortgage notes needed to be issued. These physical real estate mortgage notes were then handed over to the mortgagee to be held throughout the security period. Even though the system has changed, "old", physical real estate mortgage notes are still existing and will remain valid until they expire for instance due to the repayment of debt. However, these "old", physical real estate mortgage notes may no longer be used to establish new security rights, i.e. real estate mortgages granted to secure new debt will be electronic real estate mortgages.

A pledge over movable property, such as machinery, equipment and inventory, is created by removing the pledgor's control of the assets, e.g. by way of transferring the pledged property to the possession of the pledgee (a possessory pledge), although this is not usually commercially feasible. It is, however, possible to take a floating charge, which covers most movable assets of the chargor. A floating charge is created by the parties entering into a security agreement and the

chargor issuing one or several floating charge promissory notes which are then registered with the Trade Register. The relevant registrar has also made available a standard form of such promissory note. Once registered, the promissory notes will be delivered to the possession of the beneficiary of the floating charge to perfect the security interest.

Receivables will be covered in the floating charge, unless pledged separately. A pledge over receivables is created by the parties entering into a security agreement. In order to perfect the pledge, the underlying debtor is to be notified of the pledge and instructed to make payments to the pledgee.

Security over shares of a private limited liability company – which are most commonly not in dematerialised form – is created by the parties entering into a share pledge agreement. If share certificates have been issued by the target, the pledge is perfected by the pledgor delivering the share certificates to the possession of the pledgee, endorsed in blank. If no share certificates have been issued, the pledge is perfected by notifying the target company of the pledge and instructing it to register the pledge in its shareholder register.

Security may be created using non-Finnish law governed document, but this approach is used very rarely and is usually advised against. In any event, the Finnish law perfection requirements will need to be complied with in order to create a valid security interest.

#### **5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?**

Yes. However, the pledge of any future assets (for example receivables) that are not in existence upon their transfer may not be deemed effective or enforceable in relation to third parties until such assets have come into existence, any requisite counter-performance has been made and the pledge is duly perfected.

#### **6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?**

Yes, a single security agreement may be used to take security over all of a company's assets.

#### **7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?**

No, there are no notarisation or legalisation requirements in Finland.

#### **8. Are there any security registration requirements in your jurisdiction?**

Yes, for certain assets such as for real property, certain vessels and vehicles as well as for a floating charge and e.g. patents and trademarks, registration is required.

#### **9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?**

No. However, for the registrations (please see question 8 above), minor registration fees apply.

#### **10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?**

Yes, guarantees and security for the obligations of other group companies are allowed in Finland but are, however, limited by the rules regarding financial assistance, unlawful distribution of assets and corporate benefit. Please see question 11 below.

#### **11. Are there any issues that lenders should be aware of when requesting guarantees (for example, financial assistance or lack of corporate benefit)?**

Finnish law includes rules on financial assistance, corporate benefit and unlawful distribution of assets.

##### **1. Financial assistance**

Finnish companies are prohibited from providing loans, funds or security for the purpose of the acquisition of shares of the company or of any of its direct or indirect parent companies. This prohibition applies both before and after the acquisition. Therefore, any re-financing of acquisition debt is also generally considered to fall within

the scope of the financial assistance prohibition.

There are no set whitewash procedures available in Finland or specific time limits after which the limitation would cease to apply. Accordingly, the relevant loan and security documentation typically includes an appropriate Finnish law limitation clause limiting the liability and obligations of the Finnish companies regarding financial assistance. However, mergers are fairly commonly used as a post-acquisition solution to eliminate financial assistance concerns, where the group structure is suitable for this.

## 2. Corporate benefit

All arrangements entered into by a Finnish company must provide "adequate" corporate benefit for the relevant Finnish company. Naturally, this is something that cannot be mathematically measured and since there is no universal definition of corporate benefit under Finnish law, the matter needs to be assessed on a case by case basis taking into account the unique properties of each company, the then current circumstances and information available to the company/Board of Directors. Accordingly, it is the duty of the Board of Directors to satisfy itself that such adequate corporate benefit (e.g. in the form of the company itself being able to draw loans under the arrangement, or to reduce the borrowing costs or similar) is, indeed, available. Lenders generally require board and shareholder resolutions evidencing the corporate benefit assessment made by the Board of Directors.

## 3. lawful distribution of a company's assets

The concept of unlawful distribution of a company's assets included in the Companies Act entails in essence that any acts that diminish the company's assets or increase its debts without a business rationale. Since the concept of unlawful distribution of a company's assets is linked to the concept of business rationale, it is much entwined with the concept of corporate benefit, albeit they are two separate issues. Consequently, provided that a Finnish company receives adequate corporate benefit from entering into the contemplated transaction, it is less likely that the rules on unlawful distribution of assets would be breached. Appropriate limitation language is typically included to address the unlawful distribution of a company's assets.

## **12. Are there any restrictions against providing security to support borrowings incurred for the purposes of acquiring shares: (i) of the company; (ii) of any**

## **company which directly/indirectly owns shares in the company; or (iii) in a related company?**

Yes. Please see question 11 above regarding financial assistance.

## **13. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?**

Yes, the agent/trustee concept is recognised under Finnish law and commonly used in syndicated loans. The trustee/agent can (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate, provided that this is provided for in the underlying finance documentation.

## **14. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?**

N/A

## **15. Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?**

Interest paid to corporate entities (whether or not tax resident in Finland) under, for example, loans and debt instruments that are not considered as capital investments in the borrowing company's equity, are not subject to any withholding tax. Exceptions may apply to interest payments to individuals (although interest payments to non-Finnish tax resident individuals are generally exempt from withholding tax).

Proceeds arising from the enforcement of security or claim under a guarantee may be subject to Finnish tax depending on the type of assets converted into cash (such as profits arising from the sale of real estate

located in Finland).

**16. If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?**

As mentioned above, interest payments to non-Finnish tax residents are generally exempt from withholding tax. There is, however, a specific requirement for the payee to provide the lender with information supporting its non-Finnish tax resident status. The payee should provide the lender with its name, identity code number and address in the state of tax residence. From a tax compliance perspective, it would typically be prudent to obtain a tax-residency certificate from the payee. If the identity of the payee cannot be appropriately established, and interest payment therefore would be subject to withholding tax, the applicable standard rate is 20% for corporate entities and 30% for individuals.

**17. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?**

No particular tax issues generally arise solely on the provision of a loan, guarantee or security.

However, from the point of view of a borrower, certain collateral arrangements may affect the application of the Finnish interest barrier rules. For example, if a related party pledges an intra-group receivable as a security for a loan taken by another related party (i.e. the borrower), the loan will *de facto* be recharacterized as a related-party loan, which may have an impact on the deductible amount of interest expenses.

Further, in case the financing arrangement constitutes a cross-border hybrid mismatch, e.g. when the interest income is tax-exempt in the hands of the foreign lender, or the instrument is regarded as equity in the lender's jurisdiction, the deductibility of interest expenses could be denied for the Finnish borrower.

**18. Are there any tax incentives available for foreign lenders lending into your jurisdiction?**

There are no special tax incentives available in addition to the fact that interest payments to non-Finnish tax residents are generally not subject to any withholding tax.

**19. Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.**

Certain branch structures with double interest deduction possibilities have been successfully challenged (and denied) by the tax authorities. Also, debt push-down structures where debt is being pushed down post-acquisition should be carefully examined prior to execution.

**20. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?**

Yes. Pursuant to Article 3(1) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the Rome I Regulation), a contract shall be governed by the law chosen by the parties.

**21. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards?**

As a general rule, a judgement issued by a foreign court cannot be enforced in Finland without an international agreement or a national provision forming the basis of the enforcement action. Further, enforcement of a judgment given by a foreign court is subject to the laws of that country not being contrary to public policy of Finland, and the application of the laws of that country not resulting in an outcome contrary to the basic principles of the Finnish legal system.

Pursuant to the EU Regulation No 1215/2012, judgements rendered in EU Member States in civil and commercial matters are generally recognised and enforceable in Finland.

As a result of Brexit, judgments rendered by English courts are no longer enforceable in Finland subject to and in accordance with the EU Regulation No 1215/2012. Instead, a judgment rendered by an English court, to the extent that there is an exclusive jurisdiction clause in favour of the English courts, is enforceable in Finland

subject to and in accordance with the Hague Convention of 30 June 2005 on choice of court agreements. To the extent that there is no exclusive jurisdiction clause in favour of the English courts, a judgment of an English court is not directly enforceable in Finland. The situation will change when the UK accedes successfully to the Lugano Convention. A judgment rendered by an English court would then be enforceable in Finland subject to and in accordance with the Lugano Convention.

Foreign judgments rendered in a non-EU Member State (other than the UK) are recognised and enforced in Finland only if such recognition and enforcement is based on a treaty to which Finland is a party. Enforcement of third country judgements is subject to exequatur procedure.

Finland is a member of conventions including the New York Arbitration convention and the Lugano Convention.

## 22. What (briefly) is the insolvency process in your jurisdiction?

Finnish law recognises two forms of formal insolvency proceedings of corporate debtors: (i) bankruptcy and (ii) company administration.

### Bankruptcy

Bankruptcy proceedings in Finland are governed by the Bankruptcy Act. If a company is insolvent, the company may, upon an application of the company or a creditor, be placed into bankruptcy. The primary prerequisite for initiating an insolvency proceeding is that the debtor is considered insolvent. Under Finnish law, a debtor is generally considered insolvent when the debtor is unable to pay its debts when due and this inability is not temporary.

The purpose of bankruptcy proceedings is to realise the assets of the bankrupt company and to use the realisation proceeds to pay off the company's creditors in accordance with their priority ranking.

### Company administration

Finnish company administration proceedings are governed by the Company Administration Act. The purpose of company administration proceedings is to allow an insolvent company, which is nevertheless considered ultimately as a viable business, to continue its existence and for the creditors to receive a greater aggregate recovery than would be possible in bankruptcy.

The commencement of company administration

proceedings triggers a moratorium, providing the company with general protection from its creditors, both secured and unsecured. The moratorium is in force until the court confirms (or alternatively rejects) the administration programme, after which repayment of debt (including haircuts) will be covered and regulated by the administration programme.

The administration programme remains in force for a defined time period. The business activities of the company continue "as usual" during the administration programme, except for limitations deriving from the programme and some exceptions to the debtor's capacity to control its assets. The administration programme generally ends when all liabilities subject to administration have been satisfied as provided in the programme, and other stipulated actions have been completed by the debtor company.

## 23. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

The impact of the insolvency proceedings on a secured lender's ability to enforce will depend on the type of security interest.

As regards pledges of movable property, a pledgee can enforce a valid pledge despite the pending bankruptcy proceedings of the pledgor, but must notify the bankruptcy liquidator of the intended enforcement at least two weeks in advance of such enforcement and the bankruptcy liquidator has the right to postpone/prohibit enforcement for a maximum period of two months in certain circumstances.

As regards mortgage over real estate, after bankruptcy proceedings have been initiated, there are four options available for the enforcement of a real estate mortgage, with the most straightforward being a private (or public) sale by the bankruptcy liquidator with the consent of the mortgagee(s).

As regards floating charges, after bankruptcy proceedings have been initiated against the debtor, a floating charge can no longer be enforced separate from the bankruptcy proceedings. The bankruptcy liquidator will sell the assets covered by the floating charge and will then distribute the net proceeds. Depending on the bankrupt company, this can take a long time. Further, only 50 % of the net proceeds of the assets covered by the floating charge, which remain after secured claims of creditors with better priority than the holders of floating charge (in particular debts secured by pledges on

specific assets) have been satisfied, will be applied to satisfy the floating charge holders, whilst the balance (50 %) will be applied to satisfy the unsecured creditors. Holders of floating charges will stand pari passu with (other) unsecured creditors for satisfaction of their excess claims from the balance of the proceeds.

In the event that a Finnish obligor is placed into administration, an automatic stay against enforcement action applies. The automatic stay shall continue until the administration programme is approved, after which repayment of debt (including enforcement) will be covered and regulated by the administration programme.

#### **24. Please comment on transactions voidable upon insolvency.**

Generally, any transactions made within the critical period of five years (no limit applies to suspect transactions between related parties) may be revoked, if the transaction (i) favoured creditors to the detriment of other creditors, (ii) the debtor was insolvent at the time of the transaction or became insolvent as a result thereof, and (iii) that the transaction can be deemed as improper and the counterparty of the transaction knew or ought to know of the insolvent state of the debtor and the improper nature of the transaction.

Further, the repayment of a debt within the critical period of three months (two years between related parties) may be revoked where the repayment was: (i) made through the use of unusual means of payment; (ii) premature; or (iii) substantial with respect to the assets of the debtor, unless the payment was made in the ordinary course of business.

In addition, the granting of security within a critical period of three months (two years between related parties) may be revoked where (i) the security was not agreed upon when the underlying debt was entered into, or (ii) the possession/control of the security assets was not transferred to the pledgee and/or all other perfection measures were not taken without undue delay.

#### **25. Is set off recognised on insolvency?**

Yes, as a general rule, a creditor may demand the set-off of its claims against the claims of a bankruptcy debtor. There are, however, certain limitations to this intended to prevent the misuse of the right off set-off.

Set-off is generally possible in administration proceedings on the same grounds as in bankruptcy proceedings.

#### **26. Can you comment generally on the success of foreign creditors in enforcing their security and successfully recovering their outstandings on insolvency?**

Successful enforcement and/or recovery does not depend on whether the creditor is Finnish or foreign. The enforcement procedures vary somewhat depending on the type of security.

#### **27. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?**

No. However, as a result of Brexit, lending from the UK became more difficult since regulated UK entities may no longer be passport their license into Finland. Please see question 1 above.

#### **28. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?**

Traditional bank financing has remained the primary source of debt financing for many Finnish companies. In Q3 2020 the share of bank loans was approximately 71 % whereas, for example, the share of bonds was approximately 9 %. Credit funds have increased their presence in the lending market, but their share is still small compared to bank loans.

#### **29. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as (i) Brexit (ii) LIBOR transition and/or (iii) COVID 19**

As a result of Brexit, judgments rendered by English courts are no longer enforceable in Finland subject to and in accordance with the EU Regulation No 1215/2012. This entails that, for example, English judgements under asymmetric jurisdiction clauses are currently not enforceable in Finland and may require changes to the drafting of documentation. However, this has not materially affected the documentation, and this is not only a Finland-specific issue but affects the enforcement of English judgements in other EU Member States as

well. Please also see question 21 above.

The LIBOR transition has already largely been taken into account in the secured lending documentation during the last few years by including clauses re changes to

reference rates.

The effects of COVID 19 on the drafting of secured lending documentation and the structuring of such deals have remained limited so far.

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