

**BANKING AND FINANCE  
PRACTICE GROUP**

**THE NEW DEFINITION OF  
CREDIT FONCIER BUSINESS MAKES IT  
EASIER FOR INDIVIDUAL AND  
JURISTIC PERSON MORTGAGORS**

In the past, prior to any mortgage registration by the Land Department in cases where an individual or a juristic person, not a financial institution under Thai law, was the proposed mortgagor, the Land Department would first have to determine whether or not such mortgagor fell within in the definition of "Credit Foncier Business". In the event that the proposed mortgagor had the characteristic and elements of a "Credit Foncier Business", but the proposed mortgagor was not permitted or had not obtained a license granted by the Ministry of Finance to facilitate loans secured by mortgage in its ordinary course of business operation, the Land Department had an authority to and would normally reject that proposed mortgage registration.

In practice, prior to any mortgage registration, the proposed mortgagor would be required to apply for and obtain a letter from the Ministry of Finance to confirm that such lending money secured by mortgage transaction was not done in an ordinary course of its business and, therefore, not an operation of a Credit Foncier Business. The proposed mortgagor would then submit the letter to the Land Department to facilitate the required mortgage registration. The foregoing arrangement was usually a time consuming process, which would take time from a few weeks to several months.

The recent enactment of the Financial Institution Act, B.E. 2551 (2008) (the "**Financial Institution Act**") replaces and supersedes a number of Bills including (but not limited to) the Act on the Undertaking of the Finance Business, Securities Business and Credit Foncier Business, B.E. 2522 (1979), as amended, (the "**1979 Act**"), which used to be the law controlling the operation of the "Credit Foncier Business". The Financial Institution Act redefines the definition of a "Credit Foncier Business", which in theory would make life easier for individual and juristic person mortgagors.

**Definition of "Credit Foncier Business" under the 1979 Act**

Under the 1979 Act, a "Business of Credit Foncier" includes (i) a "Credit Foncier Business", (ii) a "Business of Purchasing under Sales Contract with Rights of Redemption" and (iii) other business concerning immovable property as prescribed in the ministerial regulations. In addition, a "Credit Foncier Business" was defined as a business of lending money secured by mortgages as an ordinary course of business operation.

**Mortgage Registration Difficulties under the 1979 Act and the Meaning of "Ordinary Course of Business Operation"**

The definition of a "Credit Foncier Business" under the 1979 Act caused difficulty to individuals and non-financial juristic persons wishing to mortgage the immovable property placed as collateral or security for the loans provided by them. That was because the meaning of "ordinary course of business

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operation” would effectively prohibit all types of money lending (in the ordinary course of business) secured by mortgages for all individuals and juristic persons without a financial institution licenses. Therefore, in order for an individual or juristic person to register a mortgage, the Land Department would have to be satisfied that such individual or juristic person was not mortgaging immovable property as collateral or security for loans in its “ordinary course of business operation”.

To satisfy the Land Department’s requirement, such individual or juristic person was required to apply for and obtain permission (on a case by case basis) from the Ministry of Finance. The Land Department would then consider the fact, and would, subject to its absolute and uncontrolled discretion, grant permission for such specific mortgage registration. In general, the Ministry of Finance would not grant global permission for multiple mortgage registrations, but would normally limit its permission for a specific case requested.

### **Examples of “Ordinary Course of Business Operation”**

An example of an action, which was not considered as an “ordinary course of business operation”, is a one-time registration of mortgage by a non-financial mortgagor. On the contrary, if such mortgagor has the occupation of registering many mortgages, such action would be deemed to be an “ordinary course of business operation”. In addition, in case of partnerships and companies, if a juristic entity was established with the objective of joint operation to allocate profits, such juristic entity was deemed to mortgage immovable property as its “ordinary course of business operation”, in which case if such juristic entity was not permitted by the Ministry of Finance to undertake the “Credit Foncier Business”, it would not be able to undertake such action.

### **Definition of “Credit Foncier Business” under the Financial Institution Act**

The Financial Institution Act redefines the definition of a “Credit Foncier Business” by defining that a “Credit Foncier Business” is a business of (a) accepting deposits or money from the public and (b) using such funds by means of either (i) lending money to the public secured by mortgage of immovable property or (ii) purchasing immovable property under sales contract with rights of redemption.

### **The “Credit Foncier Business” Definition under the Financial Institution Act**

In theory, for an entity to be under the definition of a “Credit Foncier Business” under the Financial Institution Act, it would have to both undertake the action of fund raising, and also lending money to the public by having a mortgage of immovable property as a collateral or security. Therefore, the action of lending money to the public and mortgaging immovable property as collateral or security for loans as an “ordinary course of business operation”, should no longer be considered as a “Credit Foncier Business” which requires a license from the Ministry of Finance under the Financial Institution Act. In addition, the Land Department should have the right to register mortgages on immovable properties in accordance with its authority and duty.

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However, it should be noted that the said theory has been confirmed by Ministry of Finance but is currently awaiting the decision and further action on the part of the Land Department.

**The Ministry of Finance  
and its view on the New  
Definition of “Credit Foncier  
Business”**

On 31 October 2008, the Ministry of Finance issued a letter to the Land Department confirming that the Land Department is able, in its absolute and uncontrolled discretion, to consider registering a mortgage of immovable property transaction in favor of a non-financial juristic person. That is because the action of lending money to the public and mortgaging immovable property as collateral or security for the loan, even though acted as an “ordinary course of business operation”, is no longer considered as a Credit Foncier Business under the Financial Institution Act. However, the Ministry of Finance requests the Land Department to report any unusual mortgage transactions, which might be a Credit Foncier Business for further scrutiny.

In conclusion, the current definition of a “Credit Foncier Business” should now allow individuals and non-financial juristic persons wishing to lend money and mortgage immovable property as a collateral or security of its loan, regardless of whether such action is done in its “ordinary course of business operation”, to be able to register such mortgage with the Land Department without having to apply for or obtain any supporting letter from the Ministry of Finance. That is as long as such individuals and non-financial juristic persons have not exercised any “fund raising” activities by accepting money or deposits from the public. In any case, it should be noted that each specific case may be subject other relevant laws and regulations.

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**For more information,  
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**THERE IS ALWAYS A  
SOLUTION.**

**Important Note and Disclaimer**

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The content of this Newsletter is prepared as of December 2008.

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