Translation

Holst,

Jørgen Holst
Partner

jho@holst-law.com
T +45 8934 1155

Our ref. 039560-0006 JHO/JGE/MDN

Circular Letter No. 5 1 July 2009

SKS 21-354/2009 – Selskabet af 1.september 2008 in bankruptcy – CVR no. 50020010 (the former Roskilde Bank A/S), Algade 14, DK-4000 Roskilde

Report and balance statement in pursuance of section 125(2) of the Danish Bankruptcy Act

1. Introduction

In my capacity as trustee of the bankrupt estate of Selskabet af 1. september 2008 in bankruptcy, CVR no. 50020010 (the former Roskilde Bank A/S – herein the "Old Roskilde Bank"), please find below my report and balance statement made pursuant to section 125(2) of the Danish Bankruptcy Act (the "Bankruptcy Act").

2. Bankruptcy order

On 6 October 2008, the Old Roskilde Bank filed for a suspension of payments. At the request of the Old Roskilde Bank, I was appointed supervisor.

On 3 March 2009, bankruptcy proceedings were commenced against the Old Roskilde Bank by order issued by the Bankruptcy Court of Roskilde following a petition in bankruptcy filed by the board of directors of the Old Roskilde Bank on 26 February 2009. The Danish Financial Supervisory Authority (the "FSA") recommended that I be appointed trustee of the bankrupt estate, cf. section 234(3) of the Danish Financial Business Act (the "Financial Business Act") and on 3 March 2009, I was appointed trustee by the Bankruptcy Court.

Following the customary announcement in the Danish Official Gazette and notices addressed to the individual creditors, the commencement of bankruptcy proceedings has been made public and the creditors have been requested to file proof of their claims made up as at the date of issue of the bankruptcy order, i.e. 3 March 2009.

Considering the fact that by way of a transfer agreement of 24 August 2008 the Old Roskilde Bank transferred all of its assets and liabilities, excluding only the subordinated capital and share capital, to a new bank that undertook to provide coverage for claims filed under section 97 of the Bankruptcy Act and all other current commitments undertaken by the former bank, my request to file proofs of claim with the bankrupt estate is aimed only at the subordinated creditors. For this purpose, subordinated creditors comprise claims that are subordinated claims according to agreement and under the Financial Business Act, i.e. claims that rank as claims under section 97 of the Bankruptcy Act.

The said new bank is Bankaktieselskabet Roskilde Bank af 24. august 2008, CVR no. 31633052. This company has subsequently changed its name into Roskilde Bank A/S, and for the purpose of this Circular Letter the company will be referred to as the "New Roskilde Bank".

At the request of a creditor, a creditors' meeting for the appointment of a creditors' committee was held on 14 April 2009. A creditors' committee consisting of vice-president Jürgen Stelljes (representing Deutsche Bank AG) and attorney Anders Aagaard (representing Taberna Europe CDO II PLC) was set up.

3. Balance statement

As for the assets and liabilities of the bankrupt estate, I refer to Circular Letter No. 3 of 5 March 2009 which was accompanied by a statement of the (known) assets and liabilities of the bankrupt estate, cf. section 125(1) of the Bankruptcy Act. The said statement is enclosed hereto as **Appendix 1**. (In all essentials, the contents of the said statement correspond to those of the statement of assets and liabilities of the Old Roskilde Bank forwarded together with Circular Letter No. 1 of 14 October 2008 during the suspension of payments of the Old Roskilde Bank.) After the taking over by the New Roskilde Bank of the previous assets and liabilities of the Old Roskilde Bank, except for the subordinated capital, the liabilities of the bankrupt estate now consist in subordinated capital contributions referred to as hybrid core capital issued under section 132 of the Financial Business Act and subordinated loan capital issued under section 136 of the same Act.

The transfer agreement mentioned briefly above was entered into on 24 August 2008 between the Old Roskilde Bank and the New Roskilde Bank (the "Transfer Agreement") in accordance with section 246(2) of the Financial Business Act. The Transfer Agreement was approved with final and binding effect by the FSA on 6 October 2008.

I enclose as **Appendix 2** hereto a translated version of the Transfer Agreement without appendices (appendices include confidential information and therefore cannot be made public).

As mentioned several times in this and previous Circular Letters, the only assets remaining in the bankrupt estate after the transfer are any sales proceeds accruing to the bankrupt estate under the adjustment clause included in the Transfer Agreement. The extent of such sales proceeds may be affected by whether or not the New Roskilde Bank decides to raise and obtains any proceeds from claims for damages, if any, against the former management and the auditors or any other third parties deemed to be (co-)liable for the losses inflicted upon the creditors and shareholders of the Old Roskilde Bank due to the operations of the Old Roskilde Bank. Please see items 5.4.2 and 6 below for further information in this respect.

Clause 6.2 of the Transfer Agreement stipulates as follows in respect of the adjustment issue:

> *"If, in connection with the final winding-up of the assets and liabilities, the Buyer can distribute to the shareholders, Danmarks Nationalbank and the Private Contingency Association for the Winding-up of Ailing Banks, Savings Banks and Cooperative Banks, an amount that exceeds the capital contributed to the Buyer by Danmarks Nationalbank and the Private Contingency Association for the Winding-up of Ailing Banks, Savings Banks and Cooperative Banks plus interest fixed as the lending rate fixed by Danmarks Nationalbank from time to time including an annual risk premium of 4.85 percentage points, the valuations set out in Appendix 2, including provisions and write-downs on loans and other outstanding debts, will be subject to adjustment prior to any payment being effected to the shareholders of the Buyer. Any such adjustment amount will be paid to the Seller for distribution among the Seller's creditors and shareholders in accordance with the provisions of the Danish Bankruptcy Act."*

Further, Clause 6.3 of the Transfer Agreement reads as follows:

> *"The Parties agree that the same principles of adjustment and interest shall apply if all shares in the Buyer are sold to third parties and, in the event of such sale, Danmarks Nationalbank and the Private Contingency Association for the Winding-up of Ailing Banks, Savings Banks and Cooperative Banks*

> *receive an amount that exceeds the capital contributed to the Buyer by Danmarks Nationalbank and the Private Contingency Association for the Winding-up of Ailing Banks, Savings Banks and Cooperative Banks plus interest fixed as the lending rate fixed by Danmarks Nationalbank from time to time including an annual risk premium of 4.85 percentage points."*

As stated in Circular Letter No. 2 of 9 January 2009, the management of the New Roskilde Bank has stated, however, that there are no prospects whatsoever of the operations of the transferred banking activities generating any proceeds that will result in an adjustment of the transfer sum to the benefit of the bankrupt estate. I have subsequently approached the New Roskilde Bank on several occasions, and these prospects have then been substantiated and confirmed. I will ensure, however, that the bankrupt estate receives complete documentation in this respect, just as I intend to investigate that the assessments resulting in the said negative prospects are based on sufficiently independent assessments by relevant experts. I will base my below statements, however, on the negative prospects described above, i.e. that no positive proceeds will be available for distribution among the creditors of the estate by reason of the adjustment clause.

In my drafting of this report under section 125(2) of the Bankruptcy Act I am obliged to investigate whether the bank's former management (and maybe also the bank's auditors) have acted in accordance with the responsibilities that generally rest upon the managers of banks. If the previous banking activities have been conducted in a way so as to inflict an unlawful loss on the Old Roskilde Bank and thereby also the creditors of the Old Roskilde Bank, there may be grounds for raising a claim for damages by the Old Roskilde Bank against the previous management (and maybe also the auditors) subject to certain specific conditions, see also items 5.5 and 6 below.

The New Roskilde Bank has informed me, however, that the new bank takes the viewpoint that any general claim for damages, cf. also Part 16 of the Danish Companies Act, including section 144 of the same Act, will be deemed to be comprised by the (contingent) assets that have been transferred to the New Roskilde Bank. This would mean that the bankrupt estate – to the benefit of the subordinated creditors and any holders of share capital – will not have any possibility of raising a claim for damages against the former management of the bank, the auditors or any other parties having – from an overall perspective – contributed to the continuation of the bank's operations after losses had been inflicted on the (subordinated) creditors and the shareholders. I will address this matter of the potential assignment to the New Roskilde bank of the right to raise a potential claim for damages in further detail in item 5.4.2 below.

4. Administration of the estate

4.1 Avoidance

As part of the administration of a bankrupt estate, section 125(3)(i) of the Bankruptcy Act stipulates that the trustee must assess whether any voidable transactions (or legal measures) have taken place. In this case, the assessment of whether any voidable transactions have taken place comprises an assessment of whether any displacing or damaging transactions have been completed in the period prior to the bankruptcy order being issued against the Old Roskilde Bank (and maybe also prior to the preceding suspension of payments period). Any such transactions may be voidable, provided that the conditions set out in the Bankruptcy Act (Part 8) in this respect have been fulfilled.

The purpose of completing such avoidance procedures is to attribute a "retroactive application" to the bankruptcy in order to have as many assets as possible distributed equally among the creditors of the estate.

The ordinary creditors of the bank have been given coverage in full by way of the Transfer Agreement. Consequently, any redemptions or other extraordinary settlements relating to creditors that would subsequently be given the status of ordinary creditors cannot be held void. Such creditors will be given coverage by way of the commitments of the New Roskilde Bank anyhow.

Against this background, my assessments made in respect of the concept of avoidance have focused only on whether any subordinated debt has been redeemed in the period until the bank filed for a suspension of payments at a point in time and under circumstances that would make it relevant for me to rely on the rules on avoidance set out in the Bankruptcy Act.

My review of the subordinated claims at various points in time indicates that only minor shifts have been made in the claims held by subordinated creditors against the Old Roskilde Bank, except for one case in which the claim of a single creditor was reduced by approx. DKK 44.5 million during the second half of 2008. According to the information received, such reduction was caused only by exchange rate fluctuations in that the claim pertains to bonds issued in Norwegian *kroner* (NOK), and therefore this matter does not involve any extraordinary payments made by the Old Roskilde Bank.

Consequently, my preliminary assessment is that no matters pertaining to individual creditors suggest that the bankrupt estate will have any reasonable ground for raising claims for avoidance against the creditors. If such claims prove to be relevant and justified anyhow, I have not made any assessment yet as to whether the proceeds to be generated by any such claim for avoidance should accrue to the bankrupt estate or to the New Roskilde Bank.

4.2 Police investigation

Section 110(4) of the Bankruptcy Act stipulates as follows:

> *"Where the trustee finds that the information obtained justifies investigation by the police of the affairs of the debtor or of any other person(s), he shall inform the police to such effect."*

At present, I find that the preliminary investigations so far made by myself and communicated to me in respect of the affairs of the Old Roskilde Bank, including the dispositions of the management, have not uncovered any *specific* aspects that may justify further investigations by the police. The ongoing investigations regarding managerial responsibility that have been commenced at the request of the New Roskilde Bank by attorneys Mogens Skipper-Pedersen and Henrik Stenbjerre, cf. item 4.3 below, and any further investigations deemed necessary by me may, however, uncover certain aspects that may give rise to me changing my preliminary assessment. It should be noted that the circumstances that lead to the breakdown of the Old Roskilde Bank and the substantial losses thereby inflicted upon the Danish community and the subordinated creditors may very likely be the result of a series of highly unfortunate and detrimental circumstances, but it may also be affected by decisions or omissions that will, from an overall point of view, give rise to liability, including criminal liability. To the extent possible, I will contribute to the investigation of any such matters to a degree that will suffice for the preferring of information, if relevant.

4.3 Administration work following the issue of the bankruptcy order

Due to the fact that the total assets and the main part of its liabilities were transferred to the New Roskilde Bank prior to the bankruptcy, the bankrupt estate of the Old Roskilde Bank contains no assets. Already around the time of issue of the bankruptcy order, I had informal contact with the New Roskilde Bank at which point it was indicated to me that an agreement was expected to be concluded with the New Roskilde Bank to ensure that the opening balance of the New Roskilde Bank included sufficient provisions to cover ordinary bankruptcy proceedings. Accordingly, on 7 April 2009 I contacted the New Roskilde Bank. At a meeting held on 15 June 2009 between a representative of the New Roskilde Bank and myself, I was given a tentative indication that the

funds required for covering the costs of the estate were available. By letter dated 19 June 2009 I received final confirmation that there would be coverage for the costs to be incurred in connection with the administration of the estate.

In addition, I received general information that the New Roskilde Bank would initiate an investigation into the background for financial breakdown, i.e. suspension of payments followed by bankruptcy proceedings, of the Old Roskilde Bank by the engagement of two independent attorneys, Mogens Skipper-Pedersen and Henrik Stenbjerre. In the said letter of 7 April 2009, I suggested that cooperation could be established and tasks could be divided between the two investigators and myself with respect to my statutory obligation to prepare a statement accounting for the main reasons for the bankruptcy for the Bankruptcy Court and the creditors.

At the said meeting held on 15 June 2009, I received positive indications that I would be given unrestricted access to the information obtained by the two investigators, and that there would be no restrictions as to my future cooperation with them. By letter of 1 July 2009 – received on the very same day – I received final confirmation in writing in this respect.

Earlier on, in connection with bankruptcy proceedings against other large Danish banks, extensive investigations have been initiated in various scenarios and in respect of individual banks as well as in general.

With respect to the winding-up of the Old Roskilde Bank, the investigation made by the National Audit Institution (in Danish: "Rigsrevisionen") into the role of the FSA is currently available, cf. "Report on the Danish Financial Supervisory Authority's activities in relation to Roskilde Bank A/S", dated June 2009.

In addition, I have been informed that the two external investigators mentioned above will present the outcome of their investigation also.

Provided that sufficient funds are available and that I find it relevant to make further investigations out of regard for the general public (the Bankruptcy Court) and the creditors (in this case mainly the subordinated creditors that will not be given coverage under the Transfer Agreement concluded with the New Roskilde Bank), I intend to coordinate the final investigations to be made by the bankrupt estate with any further investigations with a more general and society-oriented focus initiated, so that - to the widest extent possible – impartial and relevant investigations will be made into the relevant problem areas, and unnecessary double work will be avoided.

Consequently, my comments made in item 6 below are of a preliminary nature only and are further widely based on the fact that only a few days prior to the completion of this Circular Letter, I received the foundation required in order for me to carry on the usual trustee's task.

Considering the fact that all ordinary claims have been "taken over" by the New Roskilde Bank, the main part of the practical tasks performed by me in the administration of the estate have been characterised by practicalities regarding approaches made by creditors failing to understand the background for the voluntary change of debtors. In addition, my work has included clarification work with respect to certain public authorities, tax statements and reports etc.

I have also had contact with some of the former employees of Roskilde Bank who have claimed that their previous stock option schemes should be deemed to be comprised by the special rule set out in section 7 H of the Danish Tax Assessment Act. Due to the fact that this matter will be of relevance to the assets of the Old Roskilde Bank as well as its ordinary liabilities, I have authorised the New Roskilde Bank to resolve these matters. At present, I expect that at least one of the claims raised will result in the bankrupt estate being involved in a legal dispute regarding the interpretation of an agreement entered into between the board of directors of the bank and a member of the bank's former management prior to the issue of the bankruptcy order.

4.4 Dividend prospects

Based on my preliminary assessments of the contingent claims mentioned above, including whether it will at all be for the bankrupt estate to raise such claims, there is no basis for expecting that there will be any coverage, whether in full or in part, to subordinated creditors consisting of hybrid core capital and subordinated loan capital. Obviously, this means that there will be no coverage either for the shareholders of the Old Roskilde Bank.

Please note that certain individual circumstances pertaining to the granting of loans by individual creditors to the Old Roskilde Bank (like the shareholders' acquisition of shares) may entitle such creditors and investors to raise individual claims for damages against the responsible person(s) of the management and/or the auditors, if it turns out that such granting of loans and share acquisitions were based on wrongful or misleading financial information provided by the bank etc.

4.5 Winding-up of the estate

Usually, a bankrupt estate that contains no assets will be wound up once such absence of assets has been ascertained. Accordingly, the claims filed against the estate will not be subject to any examination as there are no prospects of the creditors receiving dividend.

In cases involving bankruptcy proceedings against one of Denmark's largest banks and in which the possibility of creditors obtaining coverage of their claims also depends on third party matters – in this case the settlement of the New Roskilde Bank and consequently any application of the adjustment clause – I find that the final winding-up of the estate should be postponed until the necessary clarity has been obtained as to the progress of the New Roskilde Banks' settling of the commitments taken over from the Old Roskilde Bank. In any event, the winding-up of the Old Roskilde Bank should not be completed until the necessary investigations have been made into the responsibilities of the management, the auditors etc., including whether the creditors of the Old Roskilde Bank intend to raise a claim in this respect if the New Roskilde Bank finds that such claim is of no "interest" to the New Roskilde Bank.

Conclusively, I expect that the administration of the estate may extend to several years, although the degree of actual administration work involved will be quite limited.

5. Report

5.1 Activities of the Old Roskilde Bank

The Old Roskilde Bank, which was founded back in 1884 and merged with Ringsted Sparekasse in 1996, was (is) domiciled in Roskilde and has 24 branch offices in the North and Central Zealand and Copenhagen. The objects of the business were to carry on banking activities or any other activities authorised by the Danish banking legislation.

On conclusion of the Transfer Agreement, the branch offices and the remaining banking activities were transferred to the New Roskilde Bank, and subsequently (on 29 September 2008) the New Roskilde Bank concluded an agreement on the sale of a total of 21 branches to Nordea (9 branches), Spar Nord Bank (7 branches) and Arbejdernes Landsbank (5 branches), respectively.

The share of the Old Roskilde Bank were previously listed on the Copenhagen Stock Exchange (OMX Nordic Exchange Copenhagen A/S), but the shares were suspended on 24 August 2008 and subsequently delisted on 5 March 2009 due to the bankruptcy order issued against the Old Roskilde Bank.

5.2 Management and auditors of the Old Roskilde Bank

At the date of filing for a suspension of payments, i.e. on 6 October 2008, the board of directors of the Old Roskilde Bank was composed by chairman Peter Müller (joined the board on 19 April 1991), vice-chairman Niels Erik Qvist Krüger (joined the board on 3 March 1999), Peter Holm (joined the board on 26 February 1997), Asger Ib Mardahl Hansen (joined the board on 1 March 2006) and employee directors Ove Flemming Holm (joined the board on 26 February 2003) and Linda Charlotte Larsen (joined the board on 28 February 2007). All of the said board members retired from the board of directors at an extraordinary general meeting held on the day when the petition for a suspension of payments was filed.

Since the filing for a suspension of payments on 6 October 2008, the board of directors of the Old Roskilde Bank, cf. resolution passed at the extraordinary general meeting held on 6 October 2008, has been composed by chairman Jens Løgstrup, vice-chairman Jørgen Jensen, Erling Brønnum, Ole Nielsen and Ole Scheel Krüger, except that Ole Scheel Krüger retired from the board on 29 January 2009. These persons were elected for the board primarily in order to safeguard the direct and financial interests of the shareholders during the winding-up procedure commenced against the Old Roskilde Bank.

In the period from 2005 to 2008, the following changes have been made to the composition of the board: Irene Nielsen retired on 28 February 2007 (joined the board on 23 March 1995), and Jens Winther retired on 1 March 2006 (joined the board on 24 April 1990).

In the period from 2 July 2007 and until commencement of the suspension of payments period on 6 October 2008, Søren Kaare-Andersen was the managing director of the Old Roskilde Bank. Søren Kaare-Andersen replaced the former managing director through several years, Niels Valentin Hansen (managing director since 1986). Following the commencement of the suspension of payments period, Ole Reinholdt was appointed new managing director.

The former auditors of the Old Roskilde Bank, Ernst & Young (appointed on 26 February 2003), retired as auditors at the ordinary general meeting held in the Old Roskilde Bank on 27 February 2008, and instead KPMG were appointed new auditors of the Old Roskilde Bank.

5.3 Reasons for the commencement of bankruptcy proceedings

Based on the knowledge held by me so far, and bearing in mind that I have not had the opportunity to carry out a detailed assessment of the fundamental background to the bankruptcy of the Old Roskilde Bank, it must be assumed that the commencement of bankruptcy proceedings against the Old Roskilde Bank, and that prior thereto the Old Roskilde Bank had been placed in a situation where the bank could not be restructured, are primarily attributable to the following matters:

- The risk profile and strategy pursued by the former management of the Old Roskilde Bank in the years leading up to the bankruptcy, including the intense expansion and exposure towards the construction and real estate businesses.

- The commitment by the Old Roskilde Bank in certain considerable and risk-intensive - at least considering the equity capital and balance sheet of the Old Roskilde Bank - real estate projects.

- Significantly increased risk profile on the loan portfolio.

- Insufficient internal control and hedging with respect to certain loan arrangements and non-compliance with the grant conditions set out.

- Instability on the financial markets and the crisis on the Danish real estate market that has hit the Old Roskilde Bank especially hard due to its exposure.

5.4 Transfer of the banking activities of the Old Roskilde Bank to the New Roskilde Bank.

5.4.1 *Assessment of the terms of the transfer*

As part of the administration of the estate, I am obliged as trustee to assess the terms of the transfer of the banking activities of the Old Roskilde Bank to the New Roskilde Bank completed under the Transfer Agreement, including whether there are justifiable grounds, on behalf of the (subordinated) creditors of the estate, for either contesting such transfer terms against the New Roskilde Bank and/or raising a claim for liability against the former management of the Old Roskilde Bank (and maybe also the FSA) arising out of the completion of the transfer.

The transfer of banking activities was completed by the former board of directors of the Old Roskilde Bank with the concurrent approval of the FSA, cf. section 246(2) of the Financial Business Act, cf. section 204 of the same Act. The purpose of obtaining the approval of the FSA is to ensure (i) that the positions of mainly the investors will not be weakened by any lacking solvency or liquidity on the part of the undertaking taking over the activities; and (ii) that the objective terms set up for the transfer have been met in order to ensure that the adoption by the board of directors of the transfer was lawful. However, the FSA is not responsible for the substantive implications of the transfer, including whether the transferred assets and liabilities have been valued correctly.

Moreover, in accordance with section 246(2) of the Financial Business Act, the contemplated transfer was presented to the shareholders of the Old Roskilde Bank at an extraordinary general meeting held on 1 September 2008, at which meeting the board of directors accounted for the situation of the Old Roskilde Bank and the executed Transfer Agreement.

For the purpose of assessing the terms of the transfer, the purchase price and the valuation of the individual assets and liabilities are of particular interest.

The purchase price for the assets transferred was fixed at DKK 37,330 million, settled by the assumption of debts and other liabilities equivalent to DKK 37,330 million. The transfer comprises any and all debt liabilities of the Old Roskilde Bank, except for claims pertaining to hybrid core capital and subordinated loan capital. The purchase price may subsequently be increased through the said adjustment clause, but such increase is not very likely to become relevant.

Please find enclosed as **Appendix 3** the balance sheet of the transfer of assets, debts, provisions and guarantees of Roskilde Bank A/S (Appendix 2 to the Transfer Agreement). The values stated in the balance sheet in respect of assets and liabilities are based on the Interim Report 2008 of the Old Roskilde Banks and the balance sheet included therein made up as at 30 June 2008.

As appears from the balance sheet, the purchase price was fixed on the basis of the value of the debt liabilities taken over, i.e. without separate valuations of the individual assets. Such valuation of individual assets was made in the said interim report. Moreover, goodwill is not included in the transfer.

For the purpose of the transfer, assets were written down to transfer values by DKK 1,915 million due to a change in the accounting policies applied following the discontinuation of the operations of the Old Roskilde Bank. The adjustment entails that the assets transferred are accurately equal to the liabilities of the

Old Roskilde Bank according to the interim report as at 30 June 2008 excluding the subordinated capital.

It may seem incorrect to adjust the value of the assets downwards by DKK 1,915 million, seeing that the method applied would indicate that such downward adjustment was not made on the basis of a specific assessment that there was a need for such adjustment, but was instead made up on the basis of the value of the debt liabilities taken over.

Despite the development of the Old Roskilde Bank, one may also question the absence of goodwill relating to the transferred banking activities, including the Old Roskilde Bank's branch structure consisting of 24 branches all over Zealand and the customers of such branches.

Finally, it may be considered whether the valuation of assets and liabilities was correct in other respect, particularly with respect to the write-downs of loans etc. in the first six months of 2008 amounting to no less than DKK 3,578 million.

Such speculations, however, fall outside the scope of my assignment and capability as it would require me to carry out an extremely detailed review of any and all assets and liabilities. But no piece of information that I have received indicates to me that the valuation was not made correctly under the present, quite extraordinary circumstances.

The valuation method applied is also in accordance with the method or principles applied for the fixing of purchase prices in several other transfers of the activities of ailing banks, including several transfers completed after the execution of Transfer Agreement on 24 August 2008. A small amount of goodwill, however, was included in one of the subsequent transfers in the fixing of the relevant purchase price.

When comparing the transfers of the activities of ailing banks completed in connection with the most recent bank crisis in the period from 1984-1993, it should be noted, however, that the "social" framework for the relevant transfers significantly differs from that of the bank transfers completed during the present bank crisis. Extensive investigations made into the transfers of especially ailing bank in the period 1984-1993 thus suggest that many transfers were actually completed by the acquiring banks obtaining numerous tax benefits as the acquiring banks only had to pay the value of the commitments taken over after extraordinary provisions made on the basis of a non-going-concern valuation (discontinuation). Moreover, the acquiring bank was in fact given the opportunity to succeed into the tax deficit of the ailing bank and, consequently, such transfers were widely "tax-driven".

The subordinated creditors and the shareholders of the Old Roskilde Bank are protected against excessively low valuations by way of the adjustment clause. Whether the settling by the New Roskilde Bank of the bank activities will be completed in a way so as to take due account of the subordinated creditors and the shareholders of the Old Roskilde Bank is not for me to assess. However, I have received no information that would indicate that the settling by the New Roskilde Bank of the banking activities is not completed with a view to maximise the proceeds generated thereby, potentially also to the benefit of the Old Roskilde Bank.

Against this background, it is my (preliminary) assessment that there are no grounds for generally contesting the terms of the transfer, and that the valuation of the assets and liabilities was made professionally correct. Therefore, I find that there is no basis for claiming any liability on the part of the former management of the Old Roskilde Bank or to seek to have the terms of the transfer deemed advantageous to the New Roskilde Bank to a degree that would qualify for a legally justifiable objection. As for the role of the FSA, please see item 5.6 below.

By the taking over by the New Roskilde Bank of any and all debt liabilities, except for subordinated creditors, the ordinary creditors will be certain to have equal coverage in full (equal ranking), and this principle is in line with the priciples of the Bankruptcy Act.

*****

With regard to the managerial responsibility for the transfer of the activities of the Old Roskilde Bank, I wish to note that the transactions made by the management are in line with common practice with respect to the transfer of undertakings prior to the commencement of bankruptcy proceedings.

The cases in which managements have been held liable are scenarios in which the transfer has been completed in a way so as to set aside the interests of creditors or otherwise contribute to an unequal distribution of the assets of the selling undertaking among the relevant creditors, i.e. non-compliance with the principle of equality under Danish insolvency law. Such cases typically pertain to transfers of assets (significantly) below market value.

The following judgments delivered by the Danish Supreme Court are examples of such cases: U1989.812 H (liability in damages on the part of board members and managers in respect of the sale of an insolvent private limited company); U2000.1013/2 H (transfer of data undertaking); U2001.873 H (real estate transfer); and U2005.2235 H (transfer of car dealer).

5.4.2 *Transfer of contingent assets, including claims against the management and auditors*

As mentioned above, the New Roskilde Bank has indicated – upon request – that according to the New Roskilde Bank's interpretation of the Transfer Agreement any claim for damages against the management and the auditors will accrue to the New Roskilde Bank and not to the bankrupt estate. I have not yet made any final assessment as to whether the opinion expressed by the New Roskilde Bank is acceptable.

Several pros and cons must be taken into consideration in such assessment, and below I will provide a brief account thereof.

In my opinion, the following aspects support the opinion expressed by the New Roskilde Bank:

Firstly, Clause 3.1 of the Transfer Agreement provides the following description of the transferred assets:

> *"The transfer comprises any and all Danish and foreign assets belonging to the Seller as at the Effective Date.*
>
> *Consequently, the transfer comprises, but is not limited to, the assets listed in the Seller's audited balance sheet as at 30 June 2008, including all cash amounts, loans and outstanding debts, cf. Appendix 2."* (my underscoring)

The Transfer Agreement further lists a number of specific assets comprised by the transfer, and Clause 3.6 concludes the section on the transferred assets as follows:

> *"The Buyer will take over all other assets of the Seller, including chattels personal, equipment, prepayments and accrued income and tax receivable, cf. Appendix 7."* (my underscoring)

An immediate interpretation of the above wordings would suggest that any contingent assets, including claims for damages against the management and the auditors, should be deemed to be comprised by the Transfer Agreement, irrespective of whether such assets are not expressly mentioned in the Transfer Agreement.

Secondly, it may be argued that the legal positions of the subordinated creditors will not be weakened by the raising of any claims for damages by the New Roskilde Bank, seeing that the interests of the creditors will be safeguarded by the adjustment clause included in the Transfer Agreement.

There is nothing to suggest that the New Roskilde Bank does not share the interest of the bankrupt estate in raising claims for damages against the management and the auditors. This viewpoint is further supported by the commencement by the New Roskilde Bank of an external investigation into these matters.

Hypothetically, one could imagine that the Old Roskilde Bank had been in charge itself of the winding-up of the bank's activities. In such scenario the proceeds to be generated by the estate from any claims for damages raised against the former management and the auditors would be just one of several other assets and would thus form part of the basis for the distribution of dividend among the creditors. Such dividend would of course accrue firstly to the ordinary creditors ranking higher than the subordinated creditors in accordance with the order of priority. The fact that the banking activities have been transferred to a new legal entity including such contingent assets would only inflict losses upon the subordinated creditors, if this winding-up scenario is presumed to weaken the prospects of realising the total assets of the Old Roskilde Banks in a less advantageous manner as compared to preserving the relevant assets in the original legal entity.

In my opinion, the following aspects speak against the opinion expressed by the New Roskilde Bank:

Firstly, considering the special nature and interests involved in this matter, it would seem quite natural if the Transfer Agreement had expressly addressed how to handle any claims for damages against the management and the auditors, not least in view of the large public focus on the responsibilities of the managements and auditors in this case and the fact that the relevant claim amount may very well be extremely high, maybe even billions.

Secondly, it goes against the creditors' interests if the management of a company is entitled to execute, immediately before the commencement of bankruptcy proceedings, an agreement providing for the transfer of any future claim for damages against itself that will affect the bankrupt estate and thus also the creditors by depriving the bankrupt estate and the creditors of the opportunity to raise such claims against the company. This argumentation is closely linked to the argumentation according to which the overall purpose of granting the bankrupt company an opportunity to raise a claim for liability under the provisions of the Danish Public Companies Act and the Bankruptcy Act is also to support the general integrity and safeguard the interests of the bankrupt company. From a more theoretical point of view, the possibility of assigning to "any" third party the right to raise a claim for damages against the former management is contestable, regardless of what may be argued as to who is in fact, from a financial perspective, the actual "interested party" with respect to the raising of claims for damages. (My assessment here is that the

main objective is to ensure that the relevant actions for damages are brought, including actions under which the potentially liable party is able to provide financial coverage for the claims raised, e.g. by way of professional liability insurances.)

This matter, however, is characterised by the special feature that the financial interests of the creditors have been addressed by way of the said adjustment clause, and therefore any claim for damages will benefit the creditors anyhow in accordance with the principles of distribution of assets among the creditors as set out in the Bankruptcy Act. As mentioned earlier, there seems to be no indications that the New Roskilde Bank should not have an equal interest in raising such claims.

Under section 144 of the Public Companies Act, the general meeting of a company (or the trustee in the event of bankruptcy) is authorised to decide whether to bring any actions against the management or others. The Transfer Agreement providing for the transfer of the total banking activities excluding the subordinated capital was presented to the Old Roskilde Bank at an extraordinary general meeting held on 1 September 2008 and convened in accordance with section 246(2) of the Financial Business Act. It is difficult to ascertain that the general meeting has thereby consented to the transfer of potential actions for damages, but it cannot be excluded that this was the case.

Conclusively, my preliminary assessment on behalf of the bankrupt estate is that there are no grounds that suffice to contest the opinion expressed by the New Roskilde Bank that any claims for damages against the management and the auditors should accrue to the new bank. This assessment should be seen in view of the fact that, at least to a certain extent, the creditors of the Old Roskilde Bank have been given coverage under the adjustment clause.

*****

One specific matter that may go against the legitimacy in transferring the potential claim for damages to the New Roskilde Bank is the rule laid down in section 137 of the Bankruptcy Act. The wording is as follows:

> *"Where a claim has been abandoned without any settlement having been arrived at, any creditor may, within a time limit fixed by the bankruptcy court, on his own behalf institute a legal action…."*

If a creditor decides to avail himself of this rule, the net proceeds generated from such action will accrue to the bankrupt estate, and if the action is lost the costs thereof must be paid by the creditor alone.

First of all, I find that any decision to be made by the bankrupt estate whether to acknowledge the fact that a claim for damages against the former management and the auditors has been transferred to the New Roskilde Bank will be comprised by section 137 of the Bankruptcy Act if the creditors so request.

However, another question is whether any waiver by the New Roskilde Bank to raise a claim for damages against the former management and auditors of the Old Roskilde Bank will (or will also) fall within the scope of section 137 of the Bankruptcy Act or any analogue. I will not pursue this matter in further detail, but in my future communication with the New Roskilde Bank I will seek to ensure that any relevant actions against the former management and auditors are completed and that the subordinated creditors of the Old Roskilde Bank are also given the opportunity to take over such claims in accordance with the principles laid down in section 137 of the Bankruptcy Act, if such creditors wish to pursue the actions declined by the New Roskilde Bank.

5.5 Responsibility on the part of the management and the auditors

Please see item 6 below for a separate account of this matter.

5.6 Supervisory responsibility of the FSA

One may consider whether the supervisory tasks performed by the FSA in respect of the former Roskilde Bank A/S (i.e. the Old Roskilde Bank) may give rise to a claim for damages against the FSA on grounds of insufficient supervision and thus non-compliance with the obligations imposed upon the FSA under the Financial Business Act and the rules and regulations issued under the said Act.

In the recently published investigations made into the role of the FSA in the matter of Roskilde Bank A/S named "Report on the Financial Supervisory Authority's activities in relation to Roskilde Bank A/S", dated June 2009, the supervisory tasks performed by the FSA attract criticism, in that the report states e.g. that the follow-up work performed by the FSA, despite its knowledge of the difficulties faced by the bank, was insufficient, and that the FSA should have intensified its monitoring of the bank and fully adhered to the solvency requirement originally fixed. These matters may also give rise to liability in damages.

The main rule under Danish law is that public authorities may be held liable in damages with respect to the performance of "private" activities as well as the performance of actual authoritative activities. Legal theorists tend to agree, however, that such liability is limited in some cases, e.g. where the monitoring and supervisory activities are of a preventative and service-like nature, the requirements in respect of the supervisory authority are expected to be lower, except for actual detrimental actions or omissions. Assumptions are however, that the authority may incur liability in damages if the monitoring activities performed are insufficient.

When it comes to the monitoring by authorities of commercial activities, the general opinion is that the tasks performed by the authorities, and any failure in such performance, are not suitable as grounds for incurring liability. The Danish white paper no. 214/1959 regarding liability in damages on the part of the Danish state and municipalities stipulates that the supervision of banks serves only public and not individual interests in terms of liability in damages. This attitude has changed, however, and today it is assumed that insufficient supervision of banks may give rise to liability in damages.

In the case regarding the issue of bonds in Himmerlandsbanken A/S cited in U2005.1978 H, the Danish Supreme Court, with respect to the liability of the management and the bank (the case was brought against the bank only) for insufficient provisions for debtors resulting in the bank being unable to fulfil the requirements set out in the former Danish act on banks and savings banks (now the Financial Business Act), attached no importance to the fact that the bank had been making provisions in accordance with the requirements computed by the FSA. Consequently, irrespective of the fact that the bank had been acting in accordance with the requirements for additional provisions set up by the FSA, the bankrupt estate of the bank was held liable as the survey report drafted in this respect concluded that additional provisions had been required.

Despite that fact that the said matter did not involve any liability on the part of the FSA, the case seems to reflect the importance attached to the actions of the FSA as compared to an assessment of liability on the part of a management and the FSA itself.

Against this background and not least in view of general legal practice and theory in this particular area, I am of the opinion that it is highly unlikely that there will be any grounds for raising a claim for damages against the FSA.

6. Responsibility on the part of the management and the auditors

6.1 General comments

As mentioned above, the New Roskilde Bank has initiated an external investigation to ascertain whether the actions of the former management, board of directors and auditors of the Old Roskilde Bank may give rise to liability with respect to the creditors of the Old Roskilde Bank in the period until the issue of the bankruptcy order, and whether there are any grounds for bringing an action for damages in this respect. According to the most recent indications received from the bank, expectations are that the outcome of the investigation will be available some time in the coming months.

The legal counsel of the New Roskilde Bank has stated and subsequently confirmed in writing that the investigation report will be submitted to me, and that I will be given the opportunity to discuss the contents thereof and the conclusions drawn with the attorneys that have performed the investigation.

I am now awaiting the outcome of the investigation, and I will not make any final assessment as to how the bankrupt estate is to react to the conclusions drawn in the report and any steps to be taken in consequence thereof, including whether any further investigations are required by the bankrupt estate, until the report has been submitted to me.

At this present stage, it has only been possible for me to make an overall and preliminary assessment of the matter of responsibility on the part of the management and the auditors.

My preliminary assessment, based on my review of the minutes of board meetings and general meetings available for the period 2005-2008, the articles of association of the Old Roskilde Bank, annual and interim reports and stock exchange announcements, is that there may be grounds for bringing an action for damages against the former management and auditors of the Old Roskilde Bank. But again; this assessment is of a preliminary nature only.

As for the written documentation available in this respect, I wish to note that until the end of 2007 the minutes prepared in respect of board meetings had very little informative value as the main part of the items on the agenda were simply repeated with a remark being made that the relevant item was presented at the meeting, but *without* any details being provided of such presentation and *without* any account being provided of the discussions carried on by the board in respect of the relevant item. This makes it difficult to come to any actual conclusions, also with respect to the matter of a potential board liability, based on the business transacted at the board meetings. Moreover, only handwritten minutes are available for the said period, and this makes it

difficult to even read the mere contents of the minutes. Today, these matters seem quite unacceptable.

Below, I will provide a brief account of the legal basis for bringing an action for damages against the former management and auditors.

6.2 Legal basis for bringing an action for damages against the former management and auditors

The primary condition for a management or auditors to be held liable in damages is that they have acted in a culpable manner, i.e. contrary to what a management or auditors "ought" to have done in the relevant situation. The traditional standard for assessing such liability is the concept of "bonus pater familias", i.e. a comparison of the behaviour actually displayed by the relevant management or auditor against a "standard" reflecting how a reasonable, average management member or auditor would have acted in an equivalent situation.

Such assessment (and comparison) must be based on the knowledge held by the relevant management member or auditor at the time when the action was taken, and thus not the knowledge held by the trustee at the time of making his "retrospective" liability assessment. In other words, one must place oneself in the past and acquaint oneself with the scenario in which the action or omission took place. The fact that it may subsequently be concluded – based on the knowledge now held – that the relevant decision was wrong, does not suffice to incur liability. The relevant decision must have been wrong at the time when it was made – and not only afterwards.

Further, any incurring of liability is conditional upon the errors committed by the relevant management member or auditor resulting in a financial loss on the part of the Old Roskilde Bank or its creditors. If liability is to be established, the relevant error must be the direct reason for the loss incurred.

Liability in damages is a personal liability – and not a collective liability – and therefore the actions of each individual management member or auditor must be subject to an individual and separate evaluation. Therefore it may be the case that some but not all board members are liable in damages.

Liability on the part of the management may typically be established in two ways.

Firstly, liability on the part of the management may be established due to fact that the continued – i.e. too lengthy – operations of the Old Roskilde Bank inflicted an unnecessary loss upon the Old Roskilde Bank and thereby also the creditors which could have been avoided by the filing of a suspension of payments/petition in bankruptcy at an earlier point in time.

Secondly, individual creditors may have incurred individual losses, e.g. by the supply of goods on credit terms to the Old Roskilde Bank without such creditors having any knowledge of the approaching bankruptcy. Such liability will be pursued by the individual creditors claiming that the management should have put an end to any further raising of loans and credit facilities in view of the approaching financial breakdown, as the claims of such creditors will have lost its value in full or in part due to the management's failure to react.

The type of liability first described above is of particular interest to the bankrupt estate.

7. Conclusion

7.1 The future administration of the estate – irrespective of the fact that there are no prospects of any assets being available and thus no prospects of any dividend for the subordinated creditors – will include the following stages:

- Final assessment of whether the Transfer Agreement may be deemed "fair" in relation to the transferor, the now bankrupt estate, and thereby the subordinated creditors;

- Final decision as to whether the transfer of potential actions for damages against the former management and auditors etc. of the Old Roskilde Bank, as claimed by the New Roskilde Bank, is acceptable, including and further;

- Whether the New Roskilde Bank is willing to accept that the scope of any claims for damages **raised** (my emphasis) against the former management and auditors of the Old Roskilde Bank will be settled by and between the Old and the New Roskilde Bank and potentially the creditors of the Old Roskilde Bank;

- Final assessment of the extent of my contribution to the evaluation of the reasons for the bankruptcy and any managerial responsibility, especially once the outcome of the external investigation requested by the board of directors of the New Roskilde Bank is known; and

- Settlement of any legal actions to which the bankrupt estate is or will become a party.

Århus, 1 July 2009

Jørgen Holst
(no signature required – original and signed version has been submitted to the Bankruptcy Court of Roskilde)