Submission for examination by the Norwegian NCP of alleged non-compliance with the OECD Guidelines by Aker BP ASA and Aker ASA

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Dear members of the Norwegian National Contact Point for the OECD Guidelines,

Introduction and key points

1. The Complainants very much appreciate the occasion to share additional thoughts to inform your assessment whether Aker ASA and Aker BP ASA[1] complied with the OECD Guidelines in connection to the merger with Lundin Energy AB. We must ask for your understanding that it proved to be impossible to present supplementary perspectives and information to you without repeating facts and viewpoints that you are already aware of.

2. The core of our complaints is that Aker has failed to meet the OECD Guidelines' human rights due diligence (HRDD) requirements, and has contributed and continues to contribute to adverse human rights impacts, notably the ongoing denial of the right to effective remedy and reparation. At the least, the company should have identified, prevented and accounted for how, through the merger with Lundin Energy, it contributed to the violation of the right to remedy, an actual and ongoing violation of human rights. The Guidelines now oblige Aker to act promptly and decisively in order to restore compliance.

Documents and the nature of this submission

3. As the NCP is aware, there are a number of documents in which we have set out our case. We continue to rely on those documents, which should be read as part of this submission. Those documents include:

    a. *Complaint against Aker BP ASA to the Norwegian National Contact Point* of 31 May 2022.
    b. *Complaint against Aker ASA to the Norwegian National Contact Point* of 31 May 2022.
    c. *Response to the follow-up questions from the Norwegian National Contact Point of 1 August 2022, followed by reflections on the joint response by Aker BP and Aker ASA to the NCP that may be relevant for the initial assessment,* of 15 August 2022.
    d. *NGO Response to NCP*, by email on 1 November 2022.

4. In this submission, we refer to an expert opinion by Prof Anita Ramasastry, Professor of Law at the University of Washington and former Chair of the UN Working Group on Business and Human Rights and to an expert opinion by Dr Tara Van Ho, Co-Director of the Essex Business and Human Rights Project, based at the University of Essex, and frequent advisor to the OSCE, OECD, UNCTAD, and the United Nations Working Group. Their opinions are important components of this submission and are added as annexes.

5. By way of introduction to their reports, Professor Ramasastry addresses issues of (i) human rights due diligence during a mergers and acquisitions process, (ii) the provision of remedy to rights holders potentially harmed in connection with the activities of a company and its

[1] The two Aker companies refer to themselves together as "Aker" and use their full names only when referring to themselves individually. This is a sensible approach that we are happy to copy.

subsidiaries that is part of the merger and acquisition and (iii) the impact of the indemnification clause provided during a merger on the issue of a buyer or successor company's responsibility to provide remedy. Dr Van Ho explains, inter alia, that (i) a business can breach its responsibility to respect human rights when it causes or contributes to the denial of remedies by another actor (ii) such breach can occur even if that business has not caused or contributed to the denial of another human right, and (iii) a business can contribute to the denial of remedies through the acquisition of another business.

6. This submission is prepared in order to assist the NCP to conduct its final examination. As such, in the above documents and this submission:

    a. We set out the background information relevant to the NCP's assessment of why no agreement was reached between the parties in mediation. We cannot provide any detail on the specifics of the parties' positions in the mediation, due to the confidentiality agreement. The NCP is of course aware that an impasse was reached.

    b. We explain why the situation involves a failure by the companies to comply with the Guidelines. We provide materials to explain the rationale for that conclusion, which include the authoritative expert opinions of Professor Ramasastry and Dr Van Ho. We submit that the NCP should find that our complaint was well founded.

    c. We identify materials to help the NCP make recommendations to the company to improve its conduct in accordance with the Guidelines.

    d. We submit that, given the failure to conduct any adequate human rights due diligence and because of the ongoing breach of the right to remedy, this is a case in which the NCP should closely follow up with the parties in response to their recommendations.

7. This submission is divided into 4 parts:
    A. A description of the merger between Aker BP ASA and Lundin Energy AB.
    B. An analysis of the human rights due diligence (HRDD) in connection to the merger by Aker ASA and Aker BP ASA, following the ongoing cycle of six steps according to the OECD Guidelines.
    C. A summary of the specific responsibilities of Aker ASA in connection to the merger.
    D. Conclusion

A. The essence of the merger between Lundin Energy AB and Aker BP ASA

1. On 11 November 2021, the Chair and a Director of Lundin Energy were indicted on charges of aiding and abetting war crimes. In the indictment, the Swedish Prosecution Authority also claimed forfeiture of SEK 1,391,791,000 in criminal benefits from Lundin Energy. This put an end to the company's long-time strategic objective to prevent the case from going to court. Barclays was then commissioned to seek *"strategic alternatives that could also include a merger or asset disposals"*.[2] On November 29th, Lundin Energy publicly confirmed to be *"engaging in opportunities that are potentially value accretive to its shareholders".*[3]

2. Barclays contacted Aker and set the deadline for an indicative bid at December 10th. Lundin's plan was to include a limited number of interested parties in a new round, but Aker wanted to enter into

[2] Bloomberg, "*Lundin Energy Is Exploring a Sale of $10 Billion Nordic Oil Producer*", 29 November 2021, see:https://www.bloomberg.com/news/articles/2021-11-29/lundin-energy-is-said-to-explore-sale-of-10-billion-oil-company#xj4y7vzkg.

[3] Lundin Energy, *Response to market rumours*,29 November 2021, See: https://www.orron.com/download/response-to-market-rumours-regulatory/?wpdmdl=38789&refresh=65425c35dc25f1698847797/.

exclusive negotiations quickly.[4] *"For Aker, it was important to get a clarification faster than the process allowed, and Lundin accepted that, given the solutions we found. We are able to act quickly. We did not want to be part of an open bidding process. We wanted to get a quicker clarification on whether a merger with us was considered the best option, … "* according to Øyvind Eriksen, the president and CEO of Aker ASA in Dagens Næringsliv.[5] Aker's urge for a quick negotiation process precluded an adequate HRDD on the USD 23 billion merger.

3. The merger agreement was reached on Sunday morning 12 December 2021 by Kjell Inge Røkke and Øyvind Eriksen from Aker ASA, and Ian and Lukas Lundin from the Lundin Group. No representative of Aker BP ASA was present. Øyvind Eriksen and Lundin's CEO Nick Walker then spent two days finalizing the deal in meetings in Oslo on the following Monday and Tuesday.[6] The Transaction Agreement was signed and publicly announced on December 21st.

4. The structure of the transaction – distribution of shares and combination of assets, legal entities, and operations through a statutory cross-border merger with the short-lived single-purpose entity "Lundin Energy MergerCo AB" – is unusual. "*Public tender offers and other offer structures are generally preferred to statutory mergers, since the latter only allows for 20% of the consideration to be in cash, requires more formalities and documentation, and normally takes longer to complete.*"[7] A statutory merger, on the other hand, would be a preferred option for merging two companies without ending the legal existence of the target company.

5. Lundin Energy was the jewel in the crown of the Lundin Group, a conglomerate of energy and mining companies that are controlled by the Lundin family. The oil company had been exceptionally profitable and represented half of the Lundin Group's market value. It had always successfully pursued an independent *"active organic growth strategy"*.[8] Before November 2021, no representative of Lundin Energy expressed any interest in restructuring or selling the company and there were no market developments in 2021 that can explain the dramatic decision to seek a *"merger or asset disposals"*[9] and close up shop.

6. Lundin Energy identified the possibility of an indictment as a major risk because of the *"economic consequences, negative goodwill and effect on business in general"*.[10] "*The preliminary investigation by the Swedish Prosecution Authority into past activities in Sudan (1997–2003), and allegations of interference of judicial proceedings, are a direct risk to the former CEO and Chairman and pose reputational, and potential financial, risks for the Company, especially if they proceed to indictment and trial. These could include financial penalties, negative investor and bank perception leading to divestments and critical media coverage of the Company and its directors."*[11] As there were no market developments in November 2021 that can explain the decision to restructure the company, it can only be understood against the background of the indictment and its identified risks. The merger was meant to protect the interests of Lundin Energy's shareholders after the war crimes trial had become inevitable.

7. In December 2021, it was decided to restructure Aker BP ASA and Lundin Energy AB into a single company that comprised 98% of the latter and 100% of the former's market value. The war crimes

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[4] Dagens Næringsliv, "*På innsiden av Aker-duoens største deal: Røkke og Eriksen dro grytidlig med privatfly til Lundin-frokostmøte i Sveits*", 23 December 2021, see: https://www.dn.no/energi/kjell-inge-rokke/oyvind-eriksen/aker/pa-innsiden-av-aker-duoens-storste-deal-rokke-og-eriksen-dro-grytidlig-med-privatfly-til-lundin-frokostmote-i-sveits/2-1-1132585.

[5] idem.

[6] idem.

[7] Ole Kristian Aabø-Evensen, *Mergers & Acquisitions Laws and Regulations Norway 2023*, see: https://iclg.com/practice-areas/mergers-and-acquisitions-laws-and-regulations/norway.

[8] https://dev.lundin-energy.com/investors/

[9] Lundin Energy, *Press release*, November 29th, 2021.

[10] Lundin Energy, *The Board of Directors' recommendations regarding shareholder proposals of Mr. Egbert Wesselink*, 25 February 2021, see Board Response 2021 - Lundin: Sudan Legal Case (lundinsudanlegalcase.com).

[11] Lundin Energy, *End of Year Report 2021*, p. 18.

indictment was part and parcel of the negotiations. Aker needed assurances that the merged company would not carry Lundin Energy's risks. According to Øyvind Eriksen *"It has been important for us to ensure that the matters relating to the Sudan case do not in any way involve the businesses we are taking over."*[12] To relieve Lundin Energy's shareholders from their direct links to the Sudan case and prevent Aker from assuming any associated risks and responsibilities, it was agreed to hive them off. For this special purpose, the companies jointly decided to carve Orrön Energy out of Lundin Energy and bestow it with heavy legal, financial, reputational and moral risks and liabilities. The disposal of risks and responsibilities through a dedicated legal vehicle allowed Aker BP ASA to become the second largest player on the Norwegian continental shelf and enabled Lundin Energy's shareholders to escape their company's responsibilities.

8. As additional assurance that Aker BP ASA would not assume any risks or responsibilities that were to be legally owned by Lundin/Orrön Energy, it was agreed that *"Lundin Energy will indemnify the Target [*Aker BP ASA*] against losses, liabilities, costs or expenses, arising or incurred as a result of the underlying facts and circumstances relating to the Indictment, including both criminal claims and civil claims, and including the costs of handling such claims, incurred by or being made against any member of the Target group (including any successor entity) prior to or after the completion of the Merger".*[13] Human rights considerations are absent in this and all other public statements by Aker about the merger.[14]

9. The Swedish legal entity Orrön Energy was made fit for purpose, i.e. to be the sole owner of Lundin Energy's *"non-Norwegian potential liabilities related to past operations."*[15] The company could not be reduced to an empty shell as retention of "*non-Norwegian potential liabilities*" required the ability of the MSEK 1,391 forfeiture claim, or otherwise the prosecutor could block the merger. It would also have other foreseeable costs, e.g. the lawyers' bills for defending the two suspects and the company. To have the minimally required substance, the company would own three renewable energy projects that were made debt free. In addition, Orrön Energy was endowed with MUSD 130 in cash, or MSEK 1.400, approximately the forfeiture claim. The company's market capitalization on July 1st 2022, when the merger came into effect, was MSEK 2,098 (against MSEK 2,003 today). That left only MSEK 698 to cover all other costs and liabilities. Orrön Energy had all the appearances of a vehicle that was tailor-made to fend off possible challenges by the prosecutor against the merger, and to allow Aker to argue that the Combined company Aker BP ASA is not linked to Lundin Energy's human rights issues.

10. As set out above, the impact of the merger was to move almost all of the value of Lundin Energy into Aker BP ASA. This is illustrated by these graphs showing market capitalisation:

[12] Dagens Næringsliv, "*På innsiden av Aker-duoens største deal: Røkke og Eriksen dro grytidlig med privatfly til Lundin-frokostmøte i Sveits*", 23 December 2021.
[13] Aker BP and Lundin Energy, Press release, 21 December 2021.
[14] For a detailed analysis of Aker's failure to conduct HRDD on the merger, see the next chapter.
[15] Lundin Energy, Press release, 21 December 2021.

11. As to the residual amount left in Lundin/Orrön Energy, it is capable of being completely extinguished by the criminal proceedings *alone*. First, there are costs from legal fees. In 2022, Lundin/Orrön Energy spent approximately MUSD 8 on legal defence. In 2023, Orrön Energy also budgeted MEUR 8 for *"Legal costs in relation to the defence of the Company and its former representatives in the Sudan legal case."*[16] The court case may continue for another 5 years until final judgement, during which time the fees will continue to accumulate. Then there are the costs of reparation and compensation in that case. The plaintiffs in the case (who are a tiny proportion of those impacted by the events in Sudan) are claiming over MUSD 11 in reparation and compensation. These are heavy burdens for a company the size of Orrön Energy, that reported a loss of MEUR 8,3 over the first 6 months of 2023. Still, there are too many unknowns to predict whether Orrön Energy will prosper or go bust because of these risks and liabilities. It is clear, however, that it was designed to be recklessly small to carry them. Aker claims that Orrön Energy holds significant assets and can "*meet any obligations that the company may have"*, including *"all liabilities arising from their former activities in Sudan"*.[17] However, this was already disproved on 28 August 2023, when the Swedish Prosecutor increased the forfeiture claim to SEK 2,381,300,000[18], which could instantly bankrupt the company when awarded.

12. From an OECD Guidelines perspective, the main issue is that Aker BP ASA and Lundin Energy AB were restructured into a single Combined company without adequately taking potential human rights liabilities into account. With a market capitalization of over MUSD 10,000 Lundin Energy had very considerable means at its disposal. The only available estimate of damages due to human rights violations in Sudan is MUSD 1,787.[19] Before the merger, it therefore seems that there was significant value in Lundin Energy to provide for such remedy. After the merger, there is not. Aker's belief that Orrön Energy can *"meet any obligations that the company may have"* ignores the risks and responsibilities that come with the company's human rights issues. The way Orrön Energy was shaped by Aker, which was in large part to meet the costs of the criminal proceedings, it cannot meaningfully contribute to the remedy process. The merger between Aker BP and Lundin Energy was an irresponsible, selfish and callous act that turned a blind eye to the OECD Guidelines.

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[16] Orrön Energy, "*Interim report for the second quarter 2023*", p.4. In 2022, Lundin/Orrön Energy incurred MSEK 99.2 in legal costs. Orrön Energy, "*Annual and Sustainability Report 2022*", p. 67.
[17] Aker, "*Additional comments to the NCP by Aker BP AS and Aker ASA*". Letter to the Norwegian NCP, 22 November 2022.
[18] Orrön Energy, Press Release, 28 August 2023, see: https://www.orron.com/the-swedish-prosecutors-claim-for-forfeiture-of-economic-benefits-in-the-sudan-legal-case-has-been-increased/.
[19] See: https://unpaiddebt.org/calculating-the-debt/.

B. Aker's Human Rights Due Diligence connected to the merger

13. The OECD Guidelines expect Aker ASA and Aker BP ASA to have conducted human rights due diligence (HRDD) in connection to the merger between Aker BP ASA and Lundin Energy AB.[20] There can be no sensible dispute about that fact and is confirmed in some detail by Professor Ramasastry, who summarises "*In my review of relevant guidance and existing practice relating to business and human rights, it is clear that a company that adheres to the UN Guiding Principles and the OECD RBC Guidelines, should conduct human rights due diligence during a merger and acquisition"*.[21]

14. The complainants request that NCP assess any HRDDs that the Aker companies purport to have conducted in connection to the merger with Lundin Energy.

15. We invite a finding that no specific or no adequate HRDD was conducted.

16. The NCP should take into account the following factors, which confirm that no specific HRDD was conducted in connection to the merger:

    a. First, the Complainants did not find any traces in the public domain of HRDD by Aker in connection to the merger, nor by Lundin Energy for that matter.[22]

    b. Second, nor do the available public materials refer to the conduct of HRDD. In that regard, the Merger plan of 14 February 2022 contains no references to HRDD.[23] The 18 pages inventory of "*risk factors applicable to the Merger and the combined company*" in the Exemption Document of 9 March 2022 does not mention any human rights risks.

    c. Third, instead, the companies involved have identified that they only conducted limited due diligence in respect of each other. About due diligence, the Exemption Document states "*AKER BP and Lundin Energy have only been able to conduct a limited due diligence review of each other. The limited due diligence review that AKER BP and Lundin Energy have conducted of each other may have failed to identify and discover potential liabilities and deficiencies in AKER BP or Lundin Energy*,"[24] Aker BP ASA's press release announcing the merger referred to "*customary limited due diligence investigations of a confirmatory nature of certain business-related, financial and legal information regarding Aker BP and Lundin Energy"*.[25] Nowhere else does Aker mention human rights or HRDD in connection to the merger.

    d. Fourth, Aker representatives have publicly identified that no HRDD was carried out. Aker representatives told the Complainants twice that no HRDD was carried out on the merger. During a meeting on 27 January 2022 between Aker BP ASA, NPA and PAX, CEO Karl Johnny Hersvik stated that the perspective of victims of human rights violations was new to the company and that the right to remedy was

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[20] The OECD Due Diligence Guidance for Responsible Business Conduct (p.17) provides that companies should "*consider the RBC risks prior to a proposed business activity (e.g. an acquisition, restructuring, new market entry, new product or service development) projecting how the proposed activity and associated business relationships could have adverse impacts on specific RBC issues."* OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf, p.26

[21] Professor Anita Ramasastry, *Expert Opinion on the Issue of Human Rights Due Diligence and Access to Remedy in the Context of Mergers and Acquisitions*, November 2023, see Annex 2.

[22] See: www.lundin-energy.com. E.g. Lundin Energy, *Press release*, 21 December 2021, at https://www.lundin-energy.com/download/creating-the-leading-ep-company-of-the-future-combining-akerbp-and-lundin-energy-regulatory/?wpdmdl=38944&refresh=627119b4c6a381651579316/.

[23] https://akerbp.com/en/borsmelding/merger-plan-signed-with-lundin-energy-2/ and https://www.lundin-energy.com/download/akerbp-merger-plan/#

[24] Aker BP and Lundin Energy, *EXEMPTION DOCUMENT*, 9 March 2022, p. 6.

[25] Aker, Press release, '*Aker ASA and Lundin Energy combine their oil and gas businesses'*, 21 December 2021.

not considered re the merger. He suggested that victims claim remedy from the Lundin family instead of Aber BP ASA. During a meeting between the Secretary General of NPA and Aker BP ASA on 22 March 2022, Aker BP ASA representatives stated that no HRDD had been carried out on the merger and that Lundin Energy's human rights legacy had not been examined. During both meetings, Aker representatives asserted that the merger was unrelated to Lundin Energy's human rights responsibilities and that victims could not seek remedy from Aker.

e. Fifth, none of the information provided by Aker ASA or Aker BP ASA to the Norwegian NCP shows that HRDD was conducted in connection to the merger. In their joint response to the complaint, the companies assert that the due diligence included "*an assessment of whether the companies being acquired could be linked to the alleged adverse impacts*." It is submitted that the explanation given by the companies is carefully written and does not purport to argue that they conducted HRDD consistent with the Guidelines. It would be false to argue that they did in the context that, as above, representatives of the company have confirmed that no HRDD was conducted.

17. If, contrary to the evidence, it is the companies' position that HRDD was in fact conducted, we invite the NCP to investigate closely any such claim:

a. If that is the companies' assertion, the NCP should request a precise explanation of how the HRDD was conducted and, if it was, on what basis the company might assert that the process and outcomes are consistent with the HRDD process expected under the Guidelines.

b. For example, the NCP might request that the companies provide documents showing the process and outcomes of that HRDD, as it was performed at the time.

c. The NCP should anxiously enquire as to whether any HRDD process that is now identified by the company was in fact conducted prior to the merger. It should make enquiries to ensure that materials or arguments they may be invited to consider were not developed after the event to explore or justify the position of the company. The NCP will wish to receive an explanation as to the precise conduct and outcome of any HRDD from the CEO (who the companies' human rights policy confirms is responsible for the issue and who has asserted that no HRDD was conducted) and a similar explanation from any officer(s) to whom it is said that the CEO delegated the task of HRDD.

d. It seems unlikely that any company would argue that the limited due diligence performed might amount to adequate HRDD, in the context of the risk posed by the merger to the right to a remedy. It is noted that the companies have stated, inter alia, that their due diligence assessed (i) that none of the companies they would acquire had been involved in any activities or operations in Sudan, (ii) that the transactions did not limit the liability or responsibilities of Lundin.[26] The companies' own evidence before the NCP shows that they did not intend such due diligence to address the risk to the right to a remedy, which they do not appear to recognise in this context. They have argued, until at least June 2022 and incorrectly, that it is "*not the case*" that *"lack of remedy for past violations in and of itself constitutes an ongoing human rights violation (of great severity)*." They further, again incorrectly, imply that such lack of remedy is not an "*actua*l" or *"potentia*l" adverse impact.[27] If the company identifies that they did conduct due diligence, they will need to explain the basis on which they formed such views, which are incorrect for reasons given below and further expanded upon in Dr Van Ho's expert opinion.

[26] *Response to the NCP on behalf of Aker ASA and Aker BP ASA,* 24 June 2022, p.3.
[27] Idem, p.4.

18. Human rights due diligence according to the OECD Guidelines consists of an ongoing cycle of 6 steps, aimed at identifying, preventing and/or mitigating actual and potential adverse impacts. We outline the 6 steps of HRDD below and elaborate for each step how Aker ASA and Aker BP ASA should have acted to comply with the Guidelines.

Step 1: Embed responsible business conduct into policies and management systems

19. This step includes incorporating RBC expectations and policies into engagement with business relationships.[28]

20. Aker BP ASA publish a human rights policy, which in its current iteration dated 3 February 2023 provides, inter alia:

    a. that the companies recognise the internationally recognised human rights standards as established, inter alia, in the OECD Guidelines for Multinational Enterprises and the United Nations Guiding PRinciples on Business and Human Rights;

    b. they will continuously assess human rights impacts from their operations by performing human rights due diligence and propose necessary preventive risk mitigating actions if needed;

    c. they will conduct risk assessment and audits of our suppliers, contractors and business partners to assess where the right of human rights infringements is highest in order to continually improve their efforts to mitigate human rights violations; and,

    d. that the CEO is the owner of the policy and is ultimately responsible for the implementation and monitoring of its operational effectiveness.[29]

21. Aker BP ASA's 2021 Sustainability Report further claims that the company aligns its human rights work with the OECD Guidelines and OECD Due Diligence Guidance for Responsible Business Conduct. It writes that their responsibility means that they must "*know our actual and potential impacts, prevent and mitigate abuses, and address adverse impacts where we are involved. When considering new investments…we review any associated human rights issues and consider how we can ensure that our operations do not come into conflict with any of these fundamental human rights principles*."[30]

22. Aker ASA publish two policies on human rights, one for itself and one for business partners, which in their current iteration dated February and November 2023, read:

    > *"Aker shall perform human rights impact assessment and due diligence to understand and mitigate potential and actual adverse impact and ensure that Aker, through its operations, does not cause or contribute to adverse human rights impacts. Aker shall implement and enforce effective systems to minimize risks of adverse human rights impact in its operations and in its value chain. If Aker cause or contribute to adverse human rights impact Aker shall take necessary steps and strive to remedy the adverse impact."* and *"Minimum social safeguards involve abiding by the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights."*[31]

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[28] Practical actions suggested by the OECD Guidance include a.o. communicating conditions and expectations on RBC to business relationships; including conditions and expectations on RBC issues in business relationship contracts or other forms of written agreements; developing and implementing pre-qualification processes on due diligence for business relationships.

[29] Aker BP, Sustainability Report 2021, see: https://akerbp.com/en/esg/.

[30] Aker BP, Sustainability Report 2021, see: https://akerbp.com/en/esg/.

[31] Aker ASA, Sustainability Policy, February 2023, p. 5.

"Aker expects Business Partners to perform human rights impact assessment and due diligence to understand and mitigate potential and actual adverse impact and ensure that their company, through its operations, does not cause or contribute to adverse human rights impacts. Business Partners are expected to implement and enforce effective systems to minimize risks of adverse human rights impact in their operations and in supply chain. If Business Partners cause or contribute to adverse human rights impact, Aker expects Business Partners to take necessary steps and strive to remedy the adverse impact."[32]

23. The NCP is invited to find that said policies (or any policy as may have been in force) was either not followed or did not perform to ensure that appropriate human rights due diligence was conducted in respect of the merger as required by the Guidelines.

24. We rely on the evidence provided generally in this complaint in support of that argument, as it shows that the companies' policies failed to ensure any adequate HRDD was conducted in respect of the merger, nor afterwards. Alongside that evidence, the NCP will note, conspicuously, that:

    a. the policy did not prescribe that HRDD be performed in respect of the merger, albeit that this was plainly the type of situation where it should have been performed given the extreme human rights risks involved;

    b. the company have not directly stated that they conducted any human rights risk assessment or audit worthy of that description;

    c. Mr Hersvik, the CEO, who is responsible for the implementation of the policy, did not require the conduct of HRDD by his officers, and instead confirmed in January 2022 that the perspective of victims was new to the company and that the right to remedy was not considered re the merger. It is to be assumed that prior to that time he had not understood, or had elected not to apply that policy.

    d. The Guidelines are clear that HRDD is *"an ongoing exercise*". Despite this:

        i. Even after Aker had been informed of the failure of their HRDD (including by our complaint), they have not reported that they have conducted a full and proper HRDD, despite the fact that such assessment is plainly required under the Guidelines;

        ii. Even after the the NCP clarified, contrary to Aker's apparent view, that right to an effective remedy is a human right in itself and that it may be implicated in a merger,[33] the companies have not reported that they have changed or conducted again their HRDD assessment which was incorrectly premised on the notion that it was "*not the case*" that *"lack of remedy for past violations in and of itself constitutes an ongoing human rights violation (of great severity)*" and, implicitly, that such lack of remedy is not an "actual" or "potential" adverse impact.

        iii. Nor has Aker reported how any updated HRDD has responded to the further adverse impact on the right to remedy caused by events after the merger, including the increased forfeiture claim identified on 28 August 2023. This increased forfeiture claim further demonstrated that the way in which Lundin and Aker together chose to structure their merger will deny the right to remedy. The Complainants' fears were again confirmed, yet Aker has not - it would seem - conducted HRDD and implemented any adequate response. It seems, that Aker's prior claim to the NCP that

[32] Aker ASA, *Code of Conduct for Business Partners*, November 2023, p. 5.

[33] In the Initial Assessment the NCP has confirmed that "*the right to an effective remedy is a human right in itself*" and that the "*merger or acquisition of a company or group of companies may, depending on the circumstances, be linked to an adverse impact on the right to an effective remedy*".

Orrön Energy can "*meet any obligations that the company may have"*, including *"all liabilities arising from their former activities in Sudan"*[34] was disproved on 28 August 2023, when the Swedish Prosecutor's increased the forfeiture claim to SEK 2,381,300,000.[35] Aker have not purported to conduct HRDD into how the structure of the merger has again thereby prevented the right to remedy, nor have they remedied that defect.

25. By engaging in negotiations, Aker undertook to enter into a business relationship with Lundin Energy. The 11 November 2021 indictment had formally charged its prospective business partner with criminal activities involving the worst human rights violations known to mankind. The Swedish prosecutor based these charges on 80,000 pages of evidence that was made publicly available. Considering the extraordinary scale, scope and salience of the reported human rights violations, a HRDD would require serious effort.[36] Nevertheless, Aker urged and obtained a speedy merger process that merely permitted quick *"confirmatory due diligence"* and could not but fall short of the required HRDD effort.[37] They did not respond to the express need for HRDD in the standards that they purported to adhere to. If RBC had been properly embedded into their management systems, Aker would not have urged for a speedy process that would foreseeably disregard the HRDD requirements of the OECD Guidelines. They would have insisted on full HRDD and would have responded to said findings.

Step 2: Identify & assess adverse impacts in operations, supply chains & business relationships

26. At the start of the merger negotiations with Lundin Energy, the Aker companies were expected to identify and carry out an in-depth assessment of the nature and extent of actual and potential adverse impacts that were directly linked to the operations of Lundin Energy.[38] This, as further developed in the opinion of Professor Ramasastry, in part involves the identification of salient risks which is, "*in essence a prioritisation of human rights risks that are the most severe*".[39]

27. We anticipate that there will be little or no dispute that Aker were on notice concerning issues of access to remedy or potential remedy to persons harmed by activities in Sudan. They have written to the NCP "*the allegations related to Lundin Energy's former operations in Sudan are well-known*".[40] Further the immediate context of the merger was the related criminal prosecution. The position was abundantly clear that there was an attendant risk of civil action.[41] The issue of reparations and the risk to the risk to right to remedy had been directly raised with Aker in the context of the merger, as set out in our complaint.[42] Indeed, the complaints themselves provide full expression of the issue and were filed prior to the formal merger.

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[34] Aker, "*Additional comments to the NCP by Aker BP AS and Aker ASA*". Letter to the Norwegian NCP, 22 November 2022.

[35] Orrön Energy, *Press release*, 28 August 2023, see: https://www.orron.com/the-swedish-prosecutors-claim-for-forfeiture-of-economic-benefits-in-the-sudan-legal-case-has-been-increased/.

[36] The OECD Guidance states: "*Due diligence is risk-based. The measures that an enterprise takes to conduct due diligence should be commensurate to the severity and the likelihood of the adverse impact. When the likelihood and severity of an adverse impact is high, then due diligence should be more extensive*.", p. 17.

[37] Lundin Energy, Press release, 21 December 2021.

[38] Step 2.2. requires companies to carry out in-depth assessments of their operations and business relationships in order to identify and assess specific actual and potential adverse RBC impacts.

[39] Professor Anita Ramasastry, *Expert Opinion on the Issue of Human Rights Due Diligence and Access to Remedy in the Context of Mergers and Acquisitions*, November 2023, see Annexes. Please, see the section titled "Addressing Salient Human Rights Risks in the Context of a Merger".

[40] *Response to the NCP on behalf of Aker ASA and Aker BP ASA*, 24 June 2022.

[41] See further Professor Ramasastry, p.8.

[42] See, for example, the communications referenced in *Complaint against Aker BP ASA to the Norwegian National Contact Point* of 31 May 2022, p. 11 - 12.

28. If Aker had identified and then prioritised salient human rights risks related to the merger, as they should have, they would have found at a minimum two actual adverse impacts that existed before Aker entered into a business relationship with Lundin Energy:
    a) *human rights violations in Sudan between 1997-2003*, and
    b) *the denial of a remedy for these violations*,

    and one potential adverse impact caused by the merger:
    c) *undue delay of and ongoing denial of a remedy, and its perpetuation*.

a) *human rights violations in Sudan between 1997-2003*

The OECD Guidance states: *"Due diligence is risk-based. The measures that an enterprise takes to conduct due diligence should be commensurate to the severity and the likelihood of the adverse impact. When the likelihood and severity of an adverse impact is high, then due diligence should be more extensive."*[43] There is ample reliable evidence in the public domain to demonstrate that Lundin Energy contributed to severe actual adverse human rights impacts. However, Aker acknowledge that they did not undertake to identify or assess this circumstance and its RBC risks: "*The factual allegations of whether or to what extent Lundin Energy has contributed to human rights violations will be determined by the court in accordance with the principles of due process."*[44] The OECD Guidelines do not support that companies refrain from HRDD by referring to legal proceedings. In addition and applied to this specific instance,Aker's statements conflate the OECD Guidelines' expectations with criminal proceedings, suggesting a flawed understanding of risk based HRDD.

The Swedish court will determine whether representatives of Lundin Energy aided and abetted "*international crime, gross crime*"[45] and whether Lundin Energy's operation in Sudan was a criminal enterprise. The court applies Swedish criminal law and corresponding standards of proof, and the suspects must be found guilty beyond reasonable doubt. The court's standards and procedures differ fundamentally from the risk-based parameters for HRDD that are set forth in the OECD Guidelines. Contrary to criminal proceedings, the starting point of the Guidelines is not the presumption of innocence and the positive obligation to prove guilt beyond reasonable doubt, but the assessment of the risk of direct linkage or contribution to a human rights violation. A company should act in response to the identified risks, not wait until these risks have materialized, as Aker seems to argue. "... *information or claims about RBC risk or impacts does not have to be completely verified (...) under an RBC risk-based due diligence approach.*"[46] The burden of proof is on the company to identify human rights risks and then to take steps to address them. This process is incomparable to a criminal trial, whereby a prosecutor must show beyond reasonable doubt that a crime has been committed.

Lundin Energy easily meets the risk-based threshold set by the Guidelines for contributing to adverse impacts. The evidentiary standard for prosecuting war crimes is extremely high. The indictment of the company and its representatives indicates an extremely high risk that they contributed to actual adverse impacts. Unless supported by an in-depth assessment, commensurate with the scale and scope of the allegations, that unequivocally exonerated Lundin Energy from contributing to any adverse human rights impacts, the Aker companies should have identified and assessed that the merger created a direct link with actual adverse impacts. Instead, they failed the requirement to identify and assess actual adverse impacts.

b) *The denial of a remedy*

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[43] OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf, p.17. See also: OECD, RBC for Institutional investors p.37: "*... attempts should be made to verify whether information about possible severe risks is genuine.".* See: RBC-for-Institutional-Investors.pdf,

[44] Aker ASA and Aker BP ASA, "*Response to the NCP on behalf of Aker ASA and Aker BP ASA",* 24 June 2022.

[45] National Prosecution Authority - National Unit Action against International and Organised Crime, Prosecutor Henrik Attorps, *Application for summons,* Case AM-35463-10, Stockholm, November 11th, 2021.

[46] OECD, *Responsible business conduct for institutional investors*, digitally accessible at RBC-for-Institutional-Investors.pdf (oecd.org), p.29.

Victims of documented human rights violations in Lundin Energy's concession in Sudan did not receive any remedy for adverse impacts. As noted, in their response to the NCP of 24 June 2022, Aker stated: "*Without further discussion, the complaints assume that lack of remedy for past violations in and of itself constitute an ongoing human rights violation. We submit that this is not the case".* The NCP rejected this position in its Initial Assessment, *"The right to an effective remedy is a human right in itself."* Consequently, as further substantiated by the expert report of Dr Van Ho[47], the denial of the right to an effective remedy is a human rights violation in itself. Accordingly, denial of a remedy is an ongoing violation that is repeated every day, until it is effectively addressed. The quoted statement by Aker indicates that, even if they were to argue that they did conduct HRDD in connection to the merger, their identification and assessment of adverse impacts was based on a flawed understanding of international human rights law and was therefore inherently insufficient and inadequate. A HRDD on the merger by Aker would have identified the risk of becoming contributing to the ongoing human rights violation of denial of the right to remedy.

c) *Undue delay of and ongoing denial of a remedy, and its perpetuation.*
It was foreseeable that, after the merger removed around 98% of its value, Lundin Energy would no longer be able to remediate severe adverse impacts for which it was responsible under the Guidelines. The merger produced a vehicle, Orrön Energy with a market capitalization of MSEK 2,098, compared to the prosecutor's forfeiture claim of MSEK 2,391.[48] If awarded, this claim alone could bankrupt Orrön Energy. Remedy consists of several factors, of which truth, apologies and guarantees of non-repetition have no direct financial component, contrary to other factors like reparation, compensation and rehabilitation. 32 plaintiffs in the Swedish war crimes trial claim an aggregate MUSD 11 in compensations for damages, compared to the estimated number of 160,000 victims of relevant human rights violations. The only available estimate of their damages is MUSD 1,787.[49] There is no need for an in-depth assessment to identify the risk of a very substantial unaddressed remedy requirement. This is a foreseeable risk, to the point of near certainty, that Orrön Energy cannot carry. This risk was not identified or assessed and/or dealt with.

22. It is important to note that Lundin Energy has been in open breach of the OECD Guidelines since they were adopted in 2011. Its Board advised twice against shareholder proposals to identify "*when and how the company and its legal predecessors may have caused or contributed to adverse human rights impact in the past*", which were subsequently defeated by the shareholders' meeting.[50] The Board's opposition to HRDD was publicised on the website that the company maintains about the criminal proceedings.[51] A HRDD by Aker would have found this deliberate breach of the Guidelines. An aggravating circumstance in this regard is that Lundin Energy operated in a conflict-affected area, which requires heightened HRDD.[52] These circumstances should have been red flags for Aker during the identification phase of their HRDD, making it all the more imperative to conduct in-depth assessments of RBC risks

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[47] Tara Van Ho, *Before the Norwegian NCP Complaint against Aker BP, Expert Opinion on the Impact of Failing to Remediate a Harm,* October 2023.

[48] See: https://www.orron.com/investors/the-share/

[49] See: https://unpaiddebt.org/calculating-the-debt/.

[50] The Board of Lundin Energy has repeatedly rejected proposals to assess the company's human rights impacts on the grounds that such would be inappropriate, impossible, unnecessary, inconclusive, would interfere with the criminal investigation, would never accepted by the company's critics, and would not be in the best interest of the company and its shareholders. See: https://www.lundinsudanlegalcase.com/company-statements/. The Board's position has been invariably supported by a large majority of shareholders.

[51] See: https://www.lundinsudanlegalcase.com/company-statements/shareholder-proposals-2012/ and https://www.lundin-energy.com/download/ot_agm_12_board_share_resp_e/?wpdmdl=6520/.

[52] United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises, "*Report on business, human right and conflict-affected regions: towards heightened action*", A/75/212, October 2020.

in connection to the merger.[53] The failure to investigate is in itself a breach of the OECD Guidelines.[54]

23. In their response to the complaint, Aker sought to argue that Lundin Energy had endorsed business and human rights standards and had committed to comply with the OECD Guidelines. Aker state that they reviewed Lundin's related policies and commitments as part of their "*compliance due diligence*". But any such review did not adequately investigate or account for the above factors showing that Lundin had not complied with those standards, nor did it account for the obvious risk to the right to remedy that would result from the merger of the firms. All multinational companies in Lundin's position should adhere to the Guidelines. Statements of adherence are therefore common. But merely reviewing such statements during compliance due diligence is insufficient. Instead, a thorough HRDD is necessary, with specific focus on the salient risks related to the right to remedy.

24. Aker ASA, an investor, failed the relevant standard as described in the OECD Guidance for Institutional Investors, *"Investors should apply more detailed investigations as part of their due diligence for investee companies that are actually, or likely to be, associated with more severe RBC risks."*[55]

25. After identifying actual and potential impacts, the OECD Guidance requires companies to "*assess the enterprise's involvement with the actual or potential adverse impacts identified in order to determine the appropriate responses (see 3.1 and 3.3). Specifically, assess whether the enterprise: caused (or would cause) the adverse impact; or contributed (or would contribute) to the adverse impact; or whether the adverse impact is (or would be) directly linked to its operations, products or services by a business relationship.*"[56] When the merger came into effect on July 1st 2022, the identified potential adverse impact – undue delay of, and ongoing denial of a remedy, and its perpetuation – became an actual impact. To come to this assessment, it is not necessary to prove beyond any doubt that Lundin Energy was denying a remedy. Under international human rights law, there can be a breach of the right to a remedy even where a party does not have responsibility for the violation that caused or contributed to it, or that violation has not been proven.[57] There is already a breach of the responsibility to provide a remedy if the denial of a remedy is *"sufficiently well-founded to be arguable"*.[58]

26. Aker should have assessed its involvement with actual and potential impacts as laid out above. Complainants assert that if Aker had done this during the merger negotiations, they would have found themselves to be contributing to adverse impacts through the merger under the negotiated conditions.[59] Aker contributed to adverse impacts by negotiating and signing a merger agreement that would foreseeably cause and even perpetuate the human rights violation of ongoing denial of remedy. In addition, Aker facilitated, incentivized and rewarded Lundin Energy and its shareholders for breaching the OECD Guidelines and thereby contributed to severe actual adverse impacts. Considering that Aker was aware of the allegations of the denial of a remedy, the two companies may have done so intentionally.

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[53] This goes for both Aker BP as well as Aker ASA. As the OECD Guidance for Institutional Investors states: *"As long as all entities in the investment value chain carry out due diligence and communicate about it to the other entities in the value chain who are relying on that due diligence, then the due diligence does not need to be duplicated. However, it will be for each entity in the value chain to judge the quality and reliability of due diligence undertaken by others in the value chain and whether supplementary action is needed."* See RBC-for-Institutional-Investors.pdf (oecd.org), p.17.

[54] Tara Van Ho, *Expert Opinion on the Impact of Failing to Remediate a Harm*, p. 6.

[55] RBC-for-Institutional-Investors.pdf (oecd.org), p.26

[56] OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf, p.27.The OECD Due Diligence Guidance for Responsible Business Conduct is the OECD's standard for compliance with the Guidelines. It will be referred to as "OECD Guidance".

[57] Dr Van Ho, pp. 4-5.

[58] Idem.

[59] According to the OECD Guidance, an enterprise contributes to an impact if its activities cause the impact in combination with the activities of other entities, or if its activities cause, facilitate or incentivize another entity to cause an adverse impact.". See OECD Guidance, p.70.

27. The OECD Guidance lays out three factors that are to be taken into account to assess whether an enterprise is contributing to an adverse impact.
    a. The extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring:
        i. the merger and the actual adverse impact of undue delay of and ongoing denial of a remedy, and the reduction in the ability of Lundin to meet the financial costs of such remedy would not have taken place had Aker not negotiated and signed the merger agreement.
    b. The extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability:
        i. Lundin Energy has repeatedly, openly and explicitly refused to conduct HRDD and consequently to address and remediate actual and potential adverse impacts that it has in all appearances contributed to and continues to contribute to each day.
        ii. Stakeholders reached out to Aker on several occasions before the conclusion of the merger with the very concerns that were expressed in the Complaints.[60]
    c. The degree to which any of enterprise's activities actually mitigated the adverse impact or decreased the risk of the impact occurring:
        i. The terms of the merger agreement did not contain any mitigating measures. On the contrary, they reduced Lundin Energy to the smallest possible size to accommodate a limited set of liabilities that ignored OECD Guidelines-related responsibilities. Aker negotiated and signed an agreement that maximized the risk that adverse impacts would continue occurring each day and forever.
        ii. To the extent that the CEO of Aker BP ASA, Mr Hersvik, intended in any way to imply that the right to remedy was to be secured by claiming remedy from the Lundin family in his comments on 27 January 2022, he or his officers appear to have taken no steps to secure that the Lundin family had made any undertaking or similar to provide such remedy when the two firms merged. Instead, around 98% of the value of Lundin appears to have been shielded from the liabilities now said to be vested in Örron Energy, which as above is highly unlikely to meet the costs of remedy. The published indemnity is directed to the potential liabilities of Aker and does not purport to assist those whose right to remedy is impacted by the merger. Mr Hersvik has made no explanation as to how the victims are to claim their right to remedy from the Lundin family when the merger that he conducted moved almost all assets from the company said to carry the relevant liabilities. If Mr Hersvik was serious in his comment that remedy should be provided by the Lundin family, he should be invited to explain (a) on what basis he reached that conclusion (b) why the merger permitted the assets of Lundin Energy that might have secured the right of remedy to be moved (c) why no assurance of remedy from the Lundin family was obtained.
        iii. In the circumstances, the NCP is invited to find that no assurance of remedy (other than directed to the criminal proceeding liability and costs) was provided during the merger.

28. The NCP is further invited to refer to the following, which is derived from Professor Ramasastry's opinion (please see her original text for footnotes):

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[60] During the telephone conference where the merger was presented by the two companies, on 21 December 2021, PAX expressed the concern that the merger would be at odds with Aker BP ASA's human rights commitments as it would deny victims of human rights violations access to remedy. Instead of addressing the issue, the Chair of Aker BP ASA asked the CEO of Lundin Energy, Nick Walker, to respond. In a meeting between NPA, PAX and Aker BP ASA on 27 January 2022, NPA and PAX shared the concern that the merger was in breach of the OECD Guidelines because no HRDD had been carried out and stakeholders had not been consulted. They argued that the merger will deny South Sudanese victims of human rights violations access to remedy and reparation, perpetuating ongoing (unremediated) impacts. Aker BP ASA's CEO Karl Johnny Hersvik acknowledged that the victims' perspective was new to the company. On 25 March 2022, 26 humanitarian and human rights organisations called upon Aker BP ASA in a letter to not buy Lundin Energy's assets under the agreed terms, as it would deprive Lundin Energy of the means to contribute to remedy for the victims.

a. A company that is initially directly linked to a negative human rights impact can subsequently contribute to the same harm, by virtue of its actions or omissions. A failure to conduct proper human rights due diligence and to address existing adverse human rights risks impacts can lead to a situation where a company contributes to the adverse impact. It is submitted that this has happened in this case.

b. Dr. Tara Van Ho's expert opinion (with which Professor Ramasatry concurs) concludes that when a business undertakes a merger or acquisition in a manner that effectively prevents victims from accessing an effective remedy – either through the denial of process or the effective denial of substantive reparations – the business has contributed to the denial of the right to an effective remedy in line with Article 2(3) of the ICCPR. Businesses should account for this in the process of their due diligence and the failure to do so, and to mitigate the impact of their conduct on the realisation of the right to an effective remedy, is a failure to respect human rights. It is submitted that there has been a failure to respect human rights in this case.

c. The OECD RBC Due Diligence Guidance outlines factors for determining when a company's actions constitute "contribution" (i) the extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring; (ii) The extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability and (iii) The degree to which any of enterprise's activities actually mitigated the adverse impact or decreased the risk of the impact occurring.

d. Using the OECD's factors, Aker's conduct in the context of the merger may have contributed to the denial of a remedy for rights holders and should be analyzed in light of this concept. Aker does not appear to have used its leverage to secure assurances of remedy during the negotiation of the merger.

e. An analysis of the facts alleged in the NCP complaint reveals certain facts that seem relevant to the question of contribution. First, the merger provided a significant opportunity for Aker to have used its leverage and sought contractual assurances and warranties from Lundin with respect to unaddressed remedy obligations. As shown by the Sasol M&A guidance, companies can, when purchasing assets, seek actions and assurances from the target with respect to remedy of adverse human rights impacts. Second, the foreseeability of there being a potential need to provide remedy to persons in South Sudan allegedly harmed by Lundin's actions. Any number of civil society communications with Lundin such as Liech Victims' Voices, provide ample notice about potential human rights claims such that Aker should have known of the alleged adverse impacts – enough to inquire further and to address possible human rights claims as part of the merger. Finally, it appears from the record that Aker did nothing further to attempt to mitigate the ongoing impact of lack of access to remedy for persons from South Sudan. It is submitted that for these reasons, and for those identified above, that Aker through the merger has contributed to the denial of remedy.

f. It is also important to note that addressing liability arising from the ongoing criminal prosecution as part of the merger is not a substitute for addressing civil claims or other type of remedial measures focusing on South Sudanese rights holders. It is submitted that the NCP should take this into account when forming any assessment. The assets of Örron Energy may meet some of the financial liabilities and other costs of the criminal prosecution but - for reasons given above - the merger was not structured to enable the wider right to remedy and in fact operates to preclude it.

g. A failure to exercise leverage, while continuing the merger and business relationship may also give rise to a contribution to the ongoing harm to rights holders of failure to provide effective remedy. Commentary to UN Guiding Principle 19 focuses on a company's failure to exercise leverage and states that states "[*i]n any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared*

to accept any consequences – reputational, financial or legal – of the continuing connection." It is submitted that, while the situation produced by the merger persists, and in the absence of a plan by Aker to ensure that adverse impacts on the right to remedy are addressed, there has been such a failure to exercise leverage.

Furthermore, beyond a failure to exercise leverage, Aker agreed to the spinoff of Orrön with limited capitalization, without any provisions relating to possible remedy for potential victims connected to Lundin's Sudan activities. There appears to be both inaction by Aker in terms of its failure to use leverage to address the issue of remedy, and failure to conduct human rights due diligence. These failures to act raise the question of the extent to which Aker participated in alleged efforts on the part of Lundin to deny remedy, through the creation of a standalone company with limited assets sufficient at most to satisfy a criminal judgement in Sweden. It is submitted that this situation has occurred and that Aker has thereby contributed to the ongoing breach of the right to remedy.

Step 3: cease, prevent or mitigate adverse impacts

29. First, as noted above, Aker does not appear to recognise the right to remedy in this context. That is incorrect for reasons that we have explained above, and as explained in the reports of Dr Van Ho and Professor Ramasastry and as confirmed by the NCP in their initial assessment. The NCP is invited to again confirm that position.

30. Second, Aker also seems to have made an error as to the response that is expected in relation to adverse impacts under the Guidelines. Their position is not clear because they provide a summary of Chapter II, para 12 of the Guidelines that is not accurate. They mischaracterise that para 12 refers to a situation caused or contributed to by a business relationship. This may have been a drafting error in their response, but there is also a risk that Aker have applied a caveat that responsibility is not shifted in 'linkage' cases which does not apply to a situation of contribution.[61] The correct Chapters of the Guidelines in respect of 'contribution' are Chapter II para 11 and Chapter IV para 1 and 2 and no such caveat applies. We note in that context that our view is that Aker have provided no considered or substantive response to the evidence that they have contributed to the adverse impact in their response to these claims. As time has passed, we note that we further consider that the evidence that Aker have contributed to the impact has increased. This is because the compounding legal costs and increasing criminal liabilities of Orrön Energy have decreased the chance that its assets might meet the costs of the wider right to remedy involved. We submit that Aker need to plainly address their position in respect of contribution and make clear that contribution entails responsibility for remedy.[62]

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[61] That second error concerns the argument made by Aker in explaining how they apply the Guidelines in this case. Aker has written: "*The Guidelines (chapter II, para 12) clearly state that the duty to seek to prevent or mitigate adverse impact caused or contributed to by a business relationship, is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship. Yet this is precisely what the Complainants seek to do*." We note that the Guideline that Aker rely upon is incorrectly quoted. Chapter II, Para 12 provides, "*Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*" (emphasis added).
Correctly stated, therefore, Chapter II, para 12 explicitly refers to situations where the company has not contributed to the impact but is instead "directly linked". It does not - as Aker seeks to summarise - refer to a case where the impact is "*caused or contributed to by a business relationship*".

[62] Where contribution is involved, there can be no dispute that the company must address such impacts. The commentary explains that "*Where an enterprise contributes or may contribute to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.*" For the avoidance of doubt, in the human rights chapter, the commentary shows that in respect of Chapter IV para 3 only there is no intention to shift responsibility from the entity causing the adverse impact on human rights to the entity with which it has a business relationship.

31. In respect of the second error, we therefore submit:

    a. The NCP should explore why Aker misquoted Chapter II Para 2. At worst, it appears they may have misunderstood the Guidelines and therefore incorrectly analysed that in situations of contribution they did not bear responsibility for contribution to the impact. It is submitted that properly prepared HRDD would have prevented any error that may have occurred.

    b. The NCP should in any event, identify what if any due diligence analysis the company performed in respect of the alleged contribution (i) at the time of the merger and (ii) subsequently in response to this complaint or otherwise. It is to be assumed that it took no or no adequate steps as (a) it incorrectly did not recognise the right to remedy and (b) it has not specified a response in respect of the allegations of contribution.

32. Irrespective of the issue regarding the errors above, it is submitted that the company has failed to cease, prevent or mitigate the relevant adverse impacts as it should have.

33. The OECD Guidance sets out in 3.1. that companies need to "*Stop activities that are causing or contributing to adverse impacts on RBC issues, based on the enterprise's assessment of its involvement with adverse impacts as per 2.3. Develop and implement plans that are fit-for-purpose to prevent and mitigate potential (future) adverse impacts.*"[63] In particular, "*In cases where the enterprise is contributing to adverse impacts or risks that are caused by another entity, it should take necessary steps to cease or prevent its contribution.*"[64]

34. Based on the assessment of its foreseeable contribution to the adverse impact as described above, Aker should have taken the necessary steps to cease or prevent this contribution. They should have done this by:

    a. Discontinuing the merger when they still could. According to the OECD Guidance 3.2., disengagement should be considered "*after failed attempts at preventing or mitigating severe impacts; when adverse impacts are irremediable; where there is no reasonable prospect of change; or when severe adverse impacts or risks are identified and the entity causing the impact does not take immediate action to prevent or mitigate them.*"[65] The conditions of the negotiated merger meet these conditions.

    b. Using its leverage on Lundin Energy during merger negotiations to ensure that its restructuring would accommodate for the RBC risks and responsibilities. The Aker companies did the opposite.

    c. Requiring Lundin Energy to consult and engage with impacted rightsholders. Lundin Energy did not contact impacted rightsholders.

    d. Aker should implement a plan to ensure that Orrön Energy has adequate capital to provide for the right to remedy and that it will meet that right to remedy, or it should otherwise ensure that Aker can and will otherwise meet those liabilities. In that regard, it is noted that Aker BP ASA is now an entity that encompasses almost all the former assets of Lundin Energy.

35. Further, the OECD Guidance prescribes that "*Meaningful engagement with relevant stakeholders is important throughout the due diligence process. In particular, when the enterprise may cause or contribute to, or has caused or contributed to an adverse impact, engagement with impacted or potentially impacted stakeholders and rightsholders will be important.*"[66] Aker has not engaged with the most relevant stakeholders - impacted rightsholders - at any point in time.

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[63] OECD Guidance, p. 29.
[64] Idem.
[65] Idem, p. 31.
[66] Idem, p. 18-19.

36. Further, as described above, if Aker were able to secure from the Lundin family an undertaking or similar that the Lundin family would provide for the right to remedy, this being Aker's only known suggestion for how remedy should be provided made prior to the merger, then Aker should publish the terms of that agreement (or if there was in fact no such agreement, they should state that publicly so that a proper assessment of whether they took any steps pursuant to their due diligence expectations to secure the right to remedy).

Step 4: Track the implementation and effectiveness of due diligence activities

37. According to OECD Guidance 4.1., Aker should have tracked the implementation and effectiveness of their due diligence activities.[67] There is no indication that Aker took any measures to cease or prevent a foreseeable contribution to adverse impacts in connection to the merger.

38. The OECD Guidance 4.1. states: *"Identify adverse impacts or risks that may have been overlooked in past due diligence processes and include these in the future."*[68] At any point since the merger agreement, Aker could and should have identified the ongoing adverse impacts it keeps contributing to each day that it does not address them. There is no indication that they have done so.

Step 5: Communicate how impacts are addressed

39. *"Communicating information on due diligence processes, findings and plans is part of the due diligence process itself. (…) An enterprise should account for how it identifies and addresses actual or potential adverse impacts and should communicate accordingly. Information should be accessible to its intended audiences (e.g. stakeholders, investors, consumers, etc.) and be sufficient to demonstrate the adequacy of an enterprise's response to impacts. Communication should be carried out with due regard for commercial confidentiality and other competitive or security concerns."*[69] The Guidance does not support blanket confidentiality for commercial reasons, but specifies examples when confidentiality may be needed – like the identity of clients, price information or supplier relationships – and recommends seeking ways around to maximize transparency. In breach of the OECD Guidelines, Aker has not disclosed any information about HRDD in connection to the merger.

Step 6: Provide for or cooperate in remediation when appropriate

40. "*When the enterprise identifies that it has caused or contributed to actual adverse impacts, address such impacts by providing for or cooperating in remediation."*[70] Complainants contend that the Aker companies have contributed and continue to contribute to actual and potential adverse impacts. Nevertheless, they have taken none of the required steps to address them.

C. On the specific responsibilities of Aker ASA

41. The complainants assert that Aker BP ASA and Aker ASA have failed to conduct adequate HRDD in connection to the merger and have contributed and continue to contribute to adverse impacts through the merger. As set out in the original complaint against Aker ASA, it holds significant and decisive managerial control over Aker BP ASA[71] and was a key driver of and

[67] I.e. its measures to identify, prevent, mitigate and where appropriate support remediation of impacts, including with business relationships.
[68] OECD Guidance, p. 32.
[69] Idem, p. 19.
[70] Idem, p. 34.
[71] Aker ASA holds 37.14% of the shares and occupies three seats in its Board of Directors, including the Chairmanship, who doubles as the Chair of Aker ASA.

played a determining role in the conclusion of the merger.[72] There is no trace in the public domain of HRDD conducted by Aker ASA. The OECD Guidelines require investors to identify, prevent and mitigate actual and potential adverse impacts of investee companies. According to the Guidelines, investors can contribute to impact through its investments. *"In some instances investors may be contributing to impacts caused by their investee companies and may be responsible for remediation. These situations could arise where investors wield significant managerial control over a company, …"*[73]

42. To comply with the OECD Guidelines,

    a. Aker ASA should have identified the actual and potential impacts laid out above as well as the fact that neither Lundin Energy nor Aker BP ASA conducted HRDD on the negotiated merger. In this regard, an important notion is made in the OECD Guidance for Institutional Investors: *"Ultimately, identification is conducted to help inform the investor's actual or potential RBC risk exposure. Thus, information or claims about RBC risk or impacts does not have to be completely verified in order to trigger further investigation and closer engagement under an RBC risk-based due diligence approach*."[74] Aker ASA should have acted on the powerful indications that Lundin Energy contributed to massive and extremely severe adverse impacts, as HRDD is essentially a risk-based approach.

    b. Aker ASA should have exercised its considerable and decisive leverage over Aker BP ASA to influence the company to prevent or mitigate the identified adverse impacts by taking the actions laid out in step 3 above, and failed to do so. Instead, Aker ASA negotiated and concluded the merger agreement, and directed and influenced Aker BP ASA to sign an agreement that contributed to ongoing adverse impacts, and facilitated, incentivized and rewarded Lundin Energy to cause adverse impacts.

43. Consequently, Aker ASA contributed to the adverse impact via its investee company Aker BP ASA and shares the responsibility with Aker BP ASA to ensure that the adverse impact that both companies have contributed to is effectively remediated.[75]

D. Conclusion

I. Both Aker ASA and Aker BP ASA breached the OECD Guidelines HRDD requirements in connection with the merger between Aker BP ASA and Lundin Energy AB.
II. Adequate HRDD in connection to the merger could and should have found that the merger would contribute to ongoing adverse impacts.
III. By entering into the merger agreement without taking adequate measures to prevent or mitigate adverse impacts that the merger would foreseeably perpetuate, Aker ASA and Aker BP ASA contributed to ongoing adverse impacts.
IV. Each day that the ongoing adverse impacts that they are contributing to remain unaddressed, Aker BP ASA and Aker ASA are in breach of the OECD Guidelines.
V. Aker ASA and Aker BP ASA are expected to ensure that victims of adverse impacts in South Sudan access their right to effective remedy and reparation.

We are conscious that at this stage of the procedure there remains an opportunity to comment on the position of the company. It will be appreciated by the NCP that the company has provided very limited public information in relation to the matters raised by this complaint and we would be content to

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[72] The decisive merger negotiations were conducted by two representatives of Aker ASA in the absence of representatives of Aker BP ASA. See: Dagens Næringsliv*, På innsiden av Aker-duoens største deal: Røkke og Eriksen dro grytidlig med privatfly til Lundin-frokostmøte i Sveits*, 23 December 2021.

[73] RBC-for-Institutional-Investors.pdf (oecd.org), p.20

[74] RBC-for-Institutional-Investors.pdf (oecd.org) p.29

[75] The OECD Guidance for Institutional Investors acknowledges that investors can be contributing to adverse impacts via an investee company: "*In some instances investors may be contributing to impacts caused by their investee companies and may be responsible for remediation. These situations could arise where investors wield significant managerial control over a company*". p.20.

respond and to clarify any issues arising from their response. We reserve the right to provide any further information and analysis that may assist.

24 November 2023, on behalf of

Civil Society Coalition on Natural Resources
Global Idé
Liech Victims' Voices
Norwegian Church Aid
Norwegian People's Aid
PAX
South Sudan Council of Churches
Swedwatch

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