Before the Norwegian NCP Complaints against Aker BP ASA and Aker ASA

Expert Opinion on the Issue of Human Rights Due Diligence and Access to Remedy in the Context of Mergers and Acquisitions

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1. My name is Prof. Anita Ramasastry. I am a law professor at the University of Washington School of Law and director of the graduate program in Sustainable International Development. I have worked in the fields of commercial law and business and human rights for more than twenty years.

2. In this opinion for the Norwegian National Contact Point (NCP), I will address issues of (i) human rights due diligence during a mergers and acquisition process and (ii) the associated issue of provision of remedy to rights holders who may have been harmed in connection with activities of a company (and its subsidiaries) that is part of the merger and acquisition. I will also address the impact of the indemnification clause during a merger on the issue of a buyer or successor company's responsibility to provide remedy.

3. In short, a company's public commitment to conduct human rights due diligence and adhere to the UN Guiding Principles on Business and Human Rights ("UN Guiding Principles" or "UN GPs") the OECD MNE Guidelines for Responsible Business Conduct ("OECD RBC Guidelines") includes an obligation to conduct human rights due diligence on a target company during a merger.

4. As part of that due diligence, a company has a corresponding obligation to address issues of remediation in connection with negative human rights impacts which it identifies in light of its due diligence. This relates to the concept of a company being, at a minimum, directly linked to the human rights impacts of the target company by virtue of the business relationship created via the merger.

5. Furthermore, a company's failure to conduct human rights due diligence in line with its own commitments, and exercise leverage to address the issue of remedy, could change what was a direct linkage situation to one where a company is contributing to an ongoing denial of access to an effective remedy. Similarly, a company may be contributing to denial of an effective remedy when it structures a merger so as to foreclose civil remedy for harms caused by the target company.

My credentials

6. I have worked in the field of business and human rights for more than two decades. From 2016-2022, I served as a member and at times chair of the United Nations Working Group on Business and Human Rights. I was appointed to this role by the United Nations Human Rights Council in 2016 and cycled off due to term limits. In this capacity, I worked with governments, businesses and civil society organizations across the globe on issues relating to implementation of the UN Guiding Principles. I also actively collaborated with the OECD Responsible Business Conduct unit on implementation of the OECD RBC Guidelines and provided input and feedback on various guidance documents focusing on human rights due diligence processes. As a member of the UN

Working Group I led the drafting of numerous Working Group reports to the UN Human Rights Council and the UN General Assembly including reports focused on business, human rights and armed conflict, cross border corporate crimes and access to remedy, and business, human rights and anti-corruption.[1]

7. I am one of the founding editors in chief of the *Business and Human Rights Journal*, a scholarly peer reviewed journal published by Cambridge University Press, which is now in its ninth year of publication.[2] I am also the founder and immediate past president of the Global Business and Human Rights Scholars Association. I have engaged in various research projects focused on the responsibility of companies in relation to international crimes and related issues of access to remedy. I served as a member of a commission of eminent jurists that developed the *Corporate Crimes Principles*, published by Amnesty International focused on issues relating to the prosecution and provision of remedy for cross border corporate crimes connected to human rights abuses.[3] I also authored a seminal study published by Fafo in 2006, *Commerce Crime and Conflict*, that addresses the ability of victims of corporate human right abuses to seek civil remedy in relation to international crimes and gross human rights abuses connected to busines activity.[4]

Background

8. As I understand it, the current complaint before the NCP centers around the issue of the merger between Aker BP ASA ("Aker") and Lundin Energy AB ("Lundin"), and a possible failure to conduct human rights due diligence and to take into account the need to provide remedy for persons who would have claims in relation to the actions of the company and its executives flowing from alleged war crimes in Sudan during the period of 1997-2003. These are claimants seeking civil remedy for human rights abuses, in addition to plaintiffs in the ongoing criminal action against executives from Lundin.

9. In December 2021, Aker and Lundin began the process of merging into a single company. The companies jointly decided to spin off Orrön Energy out of Lundin Energy. This company was bequeathed Lundin Energy's "non-Norwegian potential liabilities related to past operations". Based on the capitalisation of Orrön, it appears that it does not have assets to provide remedy to rights holders, as the funds it has on hand are at most sufficient to satisfy penalties associated with the ongoing criminal prosecution in Sweden.[5]

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[1] https://www.ohchr.org/en/special-procedures/wg-business/reports
[2] https://www.cambridge.org/core/journals/business-and-human-rights-journal
[3] https://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf
[4] Anita Ramasastry and Robert C. Thompson *Commerce, Crime and Conflict Legal Remedies for Private Sector Liability for Grave Breaches of International Law*. A Survey of Sixteen Countries. (Fafo 2006). https://www.fafo.no/en/publications/fafo-reports/commerce-crime-and-conflict
[5] Orrön Energy announced on August 29, 2023 that the prosecutor has increased his claim for forfeiture of criminal benefits from the company by SEK 1 billion, from SEK 1.381 billion to SEK 2.381 billion, or EUR 201 million. On 23 November 2023, the market capitalization of Orrön stood at SEK 2.063 billion. See https://www.Orrön.com/investors/the-share/ The prosecution's increased forfeiture claim appears at odds with Aker's assertion that Orrön, which was split off from Lundin's main business last year, will be capable of carrying Lundin's liabilities and human rights responsibilities. https://www.Orrön.com/the-swedish-prosecutors-claim-for-forfeiture-of-economic-benefits-in-the-sudan-legal-case-has-been-increased/

10. As additional assurance that Aker 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] 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."[6]

Human Rights Due Diligence in the Context of the Merger

11. By virtue of its own public commitments, Aker has committed to conducting human rights due diligence as part of its own responsibility to respect human rights. Aker has committed to conducting human rights due diligence as part of its commitments to align its operations with the OECD RBC Guidelines and the UN Guiding Principles as set forth in its own corporate reports.

12. Aker states on its web page that "Aker's commitment to respect fundamental human rights and decent working conditions are set forth in our Code of Conduct and are further reiterated in our Human Rights policy." The same web page notes that "To continuously improve our human rights efforts and avoid adverse impact on fundamental human rights and decent working conditions, we conduct human rights due diligence in order to identify risks related to our operations."[7]

13. In Aker's 2021 Sustainability Report, the company makes it clear that it adheres to the OECD Guidelines and the UN Guiding Principles:

    Aker BP supports and acknowledges the fundamental principles of human and labour rights as set out in the UN International Bill of Human Rights, UN Guiding Principles on Business and Human Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. We align our human rights work with the OECD Guidelines for Multinational Enterprises and OECD Due Diligence Guidance for Responsible Business Conduct. Our responsibility means that we must know our actual or potential impacts, prevent and mitigate abuses, and address adverse impacts where we are involved.

    When considering new investments or when tendering for goods and services, 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.[8]

14. Aker notes further that it provides remedy in relation to situations where it has caused or contributed to a human rights abuses: "Aker BP undertakes ongoing human rights due diligence to identify, prevent, mitigate and account for our human rights impacts and has processes in

[6] Press Release "Aker BP and Lundin Energy combine their oil and gas businesses" (December 21, 2021).
[7] https://akerbp.com/en/aker-bps-approach-to-human-rights/
[8] Aker BP Sustainability Report 2021 at p.18 https://akerbp.com/wp-content/uploads/2022/03/aker-bp-sustainability-report-2021.pdf

place to enable remediation for any adverse human rights impacts we cause or contribute to."[9] Similar language can be found in Aker's 2022 Sustainability Report.[10]

15. Lundin also has previously set forth basic human rights commitments. It adheres to the UN Global Compact which also has principles focused on respect for human rights. For example, its 2021 Sustainability Report notes: "As set out in our Human Rights Policy and guidelines, we endorse the United Nations Declaration of Human Rights and the United Nations Global Compact Principles. We are compliant with all relevant human rights, equality and anti-discrimination related regulations in all countries of operation."[11] While the focus of this instance is on the conduct of Aker, Lundin's commitments are relevant as well as Aker needed to assess Lundin's human rights performance in connection to its public commitments.

16. The OECD Guidelines for Responsible Business Conduct also focus on the concept of human rights due diligence in Chapter 4. The UN Guiding Principles and the OECD RBC Guidelines are closely connected and aligned. The human rights chapter of the 2011 and 2023 versions of the OECD RBC Guidelines incorporate the second pillar of the UN Guiding Principles (the corporate responsibility to respect human rights), and the due diligence concept introduced by the UN Guiding Principles is incorporated across the areas covered by the OECD Guidelines. My opinion draws from the UN Guiding Principles as well as the OECD RBC Guidelines to further explain the connection between human rights due diligence and situations of mergers and acquisitions.

17. 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.[12]

18. Guiding Principle 17 focuses on the need for businesses to conduct human rights due diligence with respect to business relationships. The commentary to Guiding Principle 17 explicitly refers to mergers and acquisitions as a situation which triggers the obligation to conduct human rights due diligence:

    Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.[13]

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[9] Aker BP Sustainability Report 2021 at p. 19.
[10] Aker Sustainability Report 2022 at p. 49 https://akerbp.com/wp-content/uploads/2023/03/aker-bp-sustainability-report-2022.pdf ("We will provide or cooperate in providing appropriate remediation to individuals, workers and local communities, where we have caused or contributed to adverse impacts on human rights. To such effect, we will also, where relevant, provide or cooperate in providing effective grievance mechanism.")
[11] https://ml-eu.globenewswire.com/Resource/Download/e0e1d966-7840-4b97-a3e6-d3d7b008c6e8
[12] Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, Follow Up Statement Regarding complaint submitted by Equitable Cambodia and Inclusive Development International on behalf of Cambodian families, Published 27 February 2020, "The AusNCP notes the OECD Guidelines expect companies to comply with the UN Guiding Principles on Business and Human Rights." p. 5. ausncp.gov.au/sites/default/files/2020-02/Complaint_11_statement.pdf
[13] UN Guiding Principles on Business and Human Rights, Commentary to Guiding Principle 17.

19. Multinational companies have publicly recognized the connection between human rights due diligence and mergers and acquisitions.[14] There are examples of good practice in how human rights due diligence should take place during a merger. The International Bar Association *Handbook for Lawyers on Business and Human Rights*, for example, has a chapter focused on human rights due diligence in relation to corporate mergers and acquisitions. This includes guidance on due diligence processes.[15]

20. Sasol, a South African global energy and chemicals company has specific human rights due diligence guidance relating to human rights considerations during M&A and joint venture transactions. Section 3.1 outlines key considerations for the company as the purchaser of assets and notes that one key consideration is civil litigation relating to human rights, including:

> *whether the target or any of its subsidiaries, employees, agents or other persons who perform or have performed services for or on behalf of the target company or any of its subsidiaries is/are subject to any pending investigations or legal claims (e.g. group actions) where the allegations pertain to breaches of human rights;* [16]

21. Section 3.2 of the Sasol guidance outlines the types of issues that Sasol as a purchaser should examine of a target company. These include "the steps that the target has taken to prevent, mitigate or remedy adverse human rights impacts".[17] The Sasol guidance lists as a condition to closing that the target company needs to spell out "the steps that the target has taken to prevent, mitigate or remedy adverse human rights impacts."

22. If negative human rights impacts are caused by a company being acquired, this creates, at a minimum, a situation of direct linkage for the acquiring/successor company. Guiding Principle 17 explicitly references the potential for human rights risks to be inherited during a merger transition. It is therefore important for Aker to disclose what sort of human rights due diligence was undertaken as part of the merger.[18]

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[14] TDK Global, "Respect for Human Rights" (asses potential human rights risks in potential new business relationships created through M&A and similar transactions). https://www.tdk.com/en/sustainability2023/social/human_rights. Coca Cola's 2022 human rights overview describes the different guidance it has created in relation to human rights due diligence including Mergers and Acquisitions (M&A) Guidance. ("M&A present a range of human rights-related risks and challenges for companies to manage. The [Global Human Rights] function worked with the company's M&A team to issue guidance to ensure potential human rights impacts are reviewed as part of the due diligence process. The M&A team has a procedure in place to escalate human rights-related issues within the company as they arise.") https://www.coca-colacompany.com/content/dam/company/us/en/policies/pdf/human-workplace-rights/human-rights-principles/human-rights-overview-2022.pdf

[15] International Bar Association, Handbook for Lawyers on Business and Human Rights, Chapter One: Mergers and Acquisitions and Corporate Restructuring (2017).

[16] Sasol, Human Rights Considerations During M&A and Joint Venture() (JV(S)) Due Diligence Guidelines https://www.sasol.com/sites/default/files/2023-02/Sasol%20M%26A%20Due%20Diligence%20Guidance%20Human%20Rights%20%282%29.pdf(note: despite the document being marked as confidential it is publicly available on Sasol's website https://www.sasol.com/sustainability/human-due-diligence-process

[17] Id.

[18] OECD Due Diligence Guidance for Responsible Business Conduct, p. 71. https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf

23. 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.[19] 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.

24. I have read and concur with Dr. Tara Van Ho's expert opinion which 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

25. 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.[20]

26. 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. As noted above Aker does not appear to have used its leverage to secure assurances of remedy during the negotiation of the merger.[21]

27. 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[22], 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

[19] The OECD RBC Due Diligence Guidance states: "An enterprise's relationship to adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring. " Id.
[20] OECD RBC Due Diligence Guidance, at pp. 70-71.
[21] UN Guiding Principle 19 describes how companies in situations of direct linkage to an adverse human rights impact should exercise leverage if possible to prevent and mitigate harm.
[22] https://unpaiddebt.org/remedy-claim/ (noting that victims groups have been asserting their claims repeatedly since 2016).

attempt to mitigate the ongoing impact of lack of access to remedy for persons from South Sudan.

28. 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.

29. 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.[23] 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."

30. 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 judgment in Sweden.

Addressing Salient Human Rights Risks in the Context of a Merger

31. The purpose of human rights due diligence is to identify human rights risks and then to take steps to address them via mitigation and, if needed, remediation. The OECD Due Diligence Guidance further states that enterprises should "[c]arry out a broad scoping exercise to identify all areas of the business, across its operations and relationships, including in its supply chains, where RBC risks are most likely to be present and most significant."[24] The scoping exercise according to the OECD Guidance should also enable a prioritization of human rights risks. The guidance further notes that scoping should be undertaken when there is a merger or acquisition.[25]

32. As part of human rights due diligence, both the OECD Guidelines and the UN Guiding Principles focus on identification of salient risks, in essence a prioritization of human rights risks that are the most severe. The OECD RBC Guidelines state that in the case of human rights, severity is a greater factor than likelihood in considering prioritisation. Thus where prioritisation is necessary

[23] The OECD RBC Due Diligence Guidance notes that "[a]n enterprise's relationship to adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring." p. 71.

[24] OECD RBC Due Diligence Guidance p. 25.

[25] Companies should "*update the scoping exercise with new information whenever the enterprise makes significant changes, such as operating in or sourcing from a new country; developing a new product or service line that varies significantly from existing lines; changing the inputs of a product or service; restructuring, or engaging in new forms of business relationships (e.g. mergers, acquisitions, new clients and markets).*" Id.

enterprises should begin with those human rights impacts that would be most severe, recognising that a delayed response may affect remediability.[26]

33. While it is unclear what sort of human rights due diligence was undertaken, it is also evident that Lundin's own disclosures should likely have put Aker on notice that there were attendant serious human rights risks arising from Lundin's prior activities and the related criminal prosecution underway. Lundin's statements in 2021 in its annual report make reference to the ongoing criminal proceeding, which was identified as a material risk.

> *Legal process in Sweden Risk: 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. Response: The Company actively defends its interests both through the Swedish legal process and in the public domain, and maintains transparent and effective engagement with key stakeholders to ensure open and informed dialog. More information on the case, why we believe it is unfounded and the ongoing legal process can be found on page 31.*[27]

34. The mention of these legal proceedings should have put Aker on notice of related issues concerning access to remedy and potential remedy to persons harmed by activities in Sudan. Commentary to UN Guiding Principle 17 (Human Rights Due Diligence) mentions specifically that civil claims may arise in the context of allegations of international crimes:

> *As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms.*

Access to Remedy in the Context of a Merger

35. As noted in Guiding Principle 17, human rights due diligence should be undertaken as part of mergers and acquisitions. Other guidance for companies also emphasizes this point.[28] While the provision of remedy is distinct from human rights due diligence, it is the process of due diligence which provides an opportunity for a company to identify salient human rights risks and then to

[26] Section II, 2.4 of the OECD Due Diligence Guidance.

[27] https://www.annualreports.com/HostedData/AnnualReports/PDF/OTC_LNDNF_2021.pdf

[28] For example, the International Organization of Employers noted in its 2013 guidance on the UN Guiding Principles for Employers: "Given the dynamics of business, due diligence on human rights should be part of existing due diligence exercises, such as those surrounding mergers and acquisitions, but it needs to be regularly repeated, used when new initiatives, products or services are in development, or when entering a new market or business relationship (supply contract, joint venture etc.) or be part of other assessments, e.g. environment." UN Guiding Principles on Business and Human Rights and Employers Guide (2012) at p. 9. IOE https://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2012-02__UN_Guiding_Principles_on_Business_and_Human_Rights_-_Employers__Guide.pdf

provide remedy when harm has already occurred. As the NCP has already noted: *"The right to an effective remedy is a human right in itself."*[29]

36. In the context of mergers, once a risk has been identified in the company being acquired or sold, the buyer should address the issue of remedy as part of its human rights obligations. This means, using leverage in the negotiations to ensure remedy is provided by the seller, or if not provided then to ensure that it is being addressed as part of the purchase.

37. Based on my review of existing commentaries and interpretations, it becomes clear that as part of a company's commitment to the UN Guiding Principles and the OECD RBC Guidelines, it needs to address human rights risks and related remedies as distinct from legal responsibilities during a merger.

38. Various commentaries explain this concept and also the distinction between responsibility under the UN Guiding Principles as distinct from legal liability. Because Aker has committed to conducting human rights due diligence and enabling or providing remedy, it should be assessed in light of its own human rights commitments. If it were not to conduct human rights due diligence or to enable or provide remedy, it would be disregarding its own public commitments.

39. It would not be consistent with the UN Guiding Principles or the OECD RBC Guidelines for companies to use a merger transaction to eliminate avenues for remediation for victims of human rights abuses committed by a target company. The UN Office of the High Commissioner for Human Rights published an interpretive guide to the UN Guiding Principles in 2012. This guide addresses the issue of remedy during a merger and notes that to the extent that a company is acquiring another in a merger, that it bears responsibility for remedy in the event that the company being acquired has not provided:

> *Similarly, if an enterprise is involved in a merger or acquisition that brings new projects, activities and relationships into its portfolio, its due diligence processes should include human rights due diligence, beginning with an assessment of any human rights risks it is taking on. Moreover, if an enterprise acquires another enterprise that it identifies as being, or having been, involved in human rights abuses, it acquires the responsibilities of that enterprise to prevent or mitigate their continuation or recurrence.* ***If the enterprise it is acquiring actually caused or contributed to the abuses but has not provided for their remediation, and no other source of effective remedy is accessible, the responsibility to respect human rights requires that the acquiring enterprise should enable effective remediation itself, to the extent of the contribution. Early assessments will be important in bringing such situations to light.*** (emphasis added)[30]

[29] NCP Initial Assessment, 27 February 2023, at pp.8-9
https://files.nettsteder.regjeringen.no/wpuploads01/sites/263/2023/02/InitialAssessment_PAXothers_AkerBP_AkerASA_EN_nett.pdf

[30] The Corporate Responsibility to Respect Human Rights. An Interpretive Guide, OHCHR, at p. 7
https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf

The Interpretive Guide, which was issued soon after the UN Guiding Principles were approved by the UN Human Rights Council, is an authoritative guidance document from the UN.

40. The United Nations Global Compact also published a guidance document on the UN Guiding Principles and mergers and acquisitions in 2013 that also discussed the issue of remedy and outlined the responsibility of companies focused on human rights to address the human rights abuses/impacts of a company being acquired.

> *Even when companies acquire businesses that had abuses or violations long ago, there is a very real reputational cost in terms of associating those past incidents with the new parent company, and those costs are becoming greater as the world continues down the path of greater interconnectivity via social sharing and online activist communities. At the very least, discovering human rights issues earlier, such as at the M&A due diligence stage, enables acquirers to demand actions from the acquisition target or at least that funds be set aside to address found issues. In either case, the full cost of those violations and risks will not fall fully on the acquirer, and that acquirer will gain reputational currency by uncovering the issues themselves and being proactive in trying to have them addressed. Importantly, the self-interest of acquirers during M&A drives them to discover pitfalls to transaction completion as early as possible. That motivation will cause acquiring companies not to "turn a blind eye" to problems, since the various costs of fixing something prior to ownership are significantly less than they will be after their ownership begins.*[31]

41. Furthermore, Shift, a leading think tank that provides guidance to governments, business and civil society on the UN Guiding Principles has published a useful guidance note on mergers that states:

> *When one company acquires another, it can inherit human rights issues that the target company has not yet resolved. Even where the acquirer structures the transaction as an asset purchase agreement, carefully leaving the seller's human rights legal liabilities behind, in practice the acquirer can still be perceived as taking on the seller's responsibility for addressing its human rights impacts.* ***This is where the distinction between legal liability and the corporate responsibility to respect human rights under the Guiding Principles comes into play: a company may be able to avoid legal liability and yet still be deemed responsible for a negative human rights impact under the Guiding Principles****.* (emphasis added)
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> *Where a company sells a business, it typically passes its responsibility to respect human rights over to the buyer. Any impacts that the company caused or contributed to and which have not been remedied either should be provided for in the agreement, or become the responsibility of the buyer. The seller also should think about how the*

31 https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FHuman_Rights_Working_Group%2FMandA_GPN.pdf

divested business is going to be used and again, seek to address any human rights risks arising from this in the agreement.[32]

42. The same guidance elaborates on the issue of human rights responsibility, and how it is different from legal liability:

> *[W]hen seeking to address issues uncovered during due diligence, a typical process will involve the M&A lawyers in seeking to allocate risks away from the company they are working to protect. Adding the human rights lens by contrast requires some attention to the root cause of the issue. For instance, where workers of the seller were harmed because they were not provided protective equipment, the buyer could seek an adjustment in the purchase price to provide remedy to those harmed, as opposed to using this money to fight possible workers' litigation.*

43. Paragraph 2 of the OECD Guidelines recommends that enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. 'Activities' can include both actions and omissions. Thus, a failure to act during the merger negotiations to secure remedy provisions of victims may also potentially be considered an activity. The OECD further states "[w]here an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. 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." In this context the enterprise would be working to secure a path to remedy for impacted rights holders.

44. An example of a situation where a company is facing civil liability in relation to actions of the company it acquired relates to the merger of two companies in the building materials trade, Lafarge and Holcim. Lafarge paid ISIS and the al-Nusrah Front for the right to operate a cement plant in Syria from 2013 to 2014. Company executives used intermediaries, personal email accounts, and falsified company records to cover up the payments. In 2015, Holcim Ltd. acquired Lafarge. Two years later, the successor entity, LafargeHolcim, issued findings of an independent internal investigation reporting that company personnel from the acquired company, Lafarge, had engaged in dealings with armed groups and sanctioned parties during 2013 until the plant closed in September 2014.

45. Significantly, despite the company's investigation and public report, in October 2022, the Department of Justice took the position that the acquiror did not conduct pre- or post-acquisition due diligence on Lafarge's Syrian operations.[33] In addition to the US enforcement

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[32] SHIFT Guidance Note "What Do Human Rights Have to Do With Mergers and Acquisitions? How Companies Can Identify and Address Human Rights Risks When Structuring M&A Transactions" (2016) https://shiftproject.org/wp-content/uploads/2016/01/Shift_MAarticle_Jan2016.pdf

[33] The Department of Justice press release notes:

> Lafarge executives did not disclose LCS's payments to ISIS and ANF to the Successor Company during pre-acquisition diligence meetings, and the Successor Company conducted neither pre- nor post-acquisition due diligence of LCS's operations in Syria, which had terminated by the time the transaction closed.

proceedings, LafargeHolcim is currently under criminal investigation in France, and is also being sued by European NGOs who represent victims as part of related civil party petitions. In the US, families of US military personnel killed by ISIS are also suing the company.[34]

Impact of the Indemnification Clause on Corporate Responsibility

46. As additional assurance that Aker 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] 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."[35]

47. An indemnification clause does not relieve a party such as Aker from responsibility for adverse human rights impacts, including the obligation to provide remedy and not to obstruct or deny access to such remedy. Any human rights obligation to provide remedy, as discussed above, would still remain with Aker given its commitments to the UN Guiding Principles and the OECD RBC Guidelines. Aker also committed itself to conducting human rights due diligence in its business relationships as well as to providing remedy in situations on contribution.

48. In the context of a merger, an indemnification clause typically identifies the situations where a successor company can seek reimbursement from a seller/target company if it is found liable for harms relating to past actions of the seller/target company. Such contractual clauses set forth the circumstances when reimbursement is permitted. What is more significant is that indemnification is a method by which another party (in this case Lundin) would reimburse or cover specific costs incurred by Aker in the event of liability.[36] Aker as the successor company would retain responsibility and would itself seek reimbursement from Lundin/Orrön for any labilities incurred. Third parties such as South Sudanese rights holders do not have to seek remedy from Orrön.

Lafarge, LCS and the Successor Company also did not self-report the conduct or fully cooperate in the investigation.

US Department of Justice Press Release "Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations" (October 18, 2022) https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations

[34] https://www.justiceinfo.net/en/103141-lafarge-judicial-twists-and-turns-corporate-liability-france.html; https://www.reuters.com/world/us/american-families-is-victims-sue-cement-maker-lafarge-over-syria-payments-2023-07-28/

[35] Press Release "Aker BP and Lundin Energy combine their oil and gas businesses" (December 21, 2021).

[36] For example, "When drafting contracts, parties – or their legal advisers who negotiate and draft the contracts for them – very often have to deal with situations of the following type: party A (the 'indemnitee') faces the risk to be confronted with certain kinds of third party claims (arising e.g. from damages suffered by the third party, outstanding debts, unpaid taxes etc.); party B (the 'indemnitor') agrees to assume (at least to some extent) the risks associated with these (potential) liabilities". Florian Scholz-Berger *The Obligation to 'Indemnify and Hold Harmless' under Austrian Law The Legal Nature, Scope and Enforcement of Indemnity Clauses*, Vienna Law Review Volume 3 (2019) https://doi.org/10.25365/vlr-2019-3-1-124

49. It is not evident from the clause whether this is intended to cover human rights related claims. Given that human rights considerations are absent in this and Aker's other public statements about the merger, the clause itself may not apply to such claims. The Sasol guidance on merger and acquisitions provides examples of general human rights warranties and pre-merger conditions that a purchaser would seek from a target company. These warranties related to the seller often address adverse human rights impacts. A pre-merger contractual condition would entail addressing existing remedy gaps and then a warranty might address any future human rights claims and litigation. It does not appear that there were any such warranties made by Lundin. When construing the current indemnification clause, the absence of human rights warranties would indicate that the clause does not cover such claim.

50. Furthermore, the indemnification clause as currently drafted appears to be an empty commitment, even if it is deemed to apply to human rights claims. Indemnification clauses are frequently connected to a seller's breach of representations and warranties contained in the merger agreement. More significant however, is that there do not appear to be any funds available to address any human rights claims. The current capitalization of Orrön is limited in a way that mirrors an initial statutory fine calculated by the Swedish prosecutor. Furthermore, it is unclear what sort of resources are available and whether Lundin has insurance or other resources to provide in the event that Aker is indeed liable for human rights claims.[37] It was foreseeable that, after the merger removed 98% of its value, Lundin would no longer be able to remediate any severe adverse impacts.

Conclusion

51. Based on my review of relevant international frameworks it is clear that a company that commits to the UN Guiding Principles and the OECD RBC Guidelines has made a commitment to conduct human rights due diligence in a merger transaction. As part of conducting human rights due diligence during a merger, a company needs to address issues of access to remedy.

52. If a company fails to conduct human rights due diligence during the merger and to address any issues of previous failures to address access to remedy by a target company, it may be contributing to a denial of access to effective remedy. The denial of remedy is itself a potential breach of a right, and an ongoing harm.

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[37] In this law firm briefing, the authors identify the consequences of an indemnity that is not backed by sufficient resources:

> Typically, the indemnitor must be a party to the agreement but may be a guarantor or a related party. When considering the party taking on the obligation, attention should be whether that party has sufficient financial resources to cover the losses imposed and, if the indemnitor is an entity, whether it will continue in existence for the period of the obligation. If the indemnitor may not be able to cover the indemnity obligation, a third-party guarantor may be brought in or provisions can be added to require the indemnitor to carry insurance to cover the indemnified risk. If a third party will be taking on an indemnification obligation or guaranty, that party will have to sign on to the contract to acknowledge the obligation or sign and deliver a separate guaranty document.

Troutman Pepper, "Factors to Consider in Negotiating Indemnification Provisions" (December 23, 2019 https://www.troutman.com/insights/factors-to-consider-in-negotiating-indemnification-provisions.html).

53. As part of its human rights commitments, the issue of remedy during a merger is a distinct issue from a company's legal liability and responsibility. The Interpretive Guide to the UN Guiding Principles makes this clear.

54. Finally, an indemnification clause where a seller/target company indemnifies a purchaser, does not relieve the purchase company from liability for human rights claims. Rather it merely provides a provision for the purchaser to seek reimbursement for liabilities if these do incur.