Before the National Contact Point for Responsible Business Conduct Norway

PAX, Civil Society Coalition on Natural Resources, Global Idé, Liech Victims Voices, Norwegian Church Aid, Norwegian People's Aid, South Sudan Council of Churches and Swedwatch (complainants) against Aker BP ASA and Aker ASA (respondents)

RESPONSE AND SUBMISSIONS OF AKER BP ASA AND AKER ASA

Dear members of the Norwegian Contact Point for Responsible Business Conduct,

We refer to the submissions filed by the Complainants on 24 November 2023 ("Submissions") and hereby submit the companies' response and own submissions in respect of the issues to be examined by the NCP ("Response"). It should be noted that the response we filed on 24 June 2022 ("Initial Response") addressed the procedural questions relevant for considering the admissibility criteria and that this Response is where we reply to the substantive issues under consideration. This will explain the length of this document. We base our response on the complaint against Aker BP ASA ("the Complaint") and refer to Aker ASA only where relevant. The specific allegations against Aker ASA will be addressed in Part IV. We will continue to refer to the companies separately, Aker BP ASA as "Aker BP" and Aker ASA under its full name[1]. We refer to Lundin Energy AB (previously Lundin Petroleum AB) both as "Lundin Energy" and with the new company name "Orrön Energy". We should add that all emphasis in quotes is added by us. For the sake of good order, we also point out that we will refer to the 2011 OECD Guidelines for Multinational Enterprises ("the Guidelines"), as this edition was the relevant one at the time.

The complainants have provided two expert opinions in support of their submissions. We believe that the NCP could be further assisted by an expert opinion by Professor Marius Emberland, a renown Norwegian human rights expert, addressing the protection of the right to an effective remedy under international human rights law and submit Professor Emberland's expert opinion as part of this Response.

Our Response is organised as follows:

- In PART I we address the issues to be examined in the Specific Instance and discuss the right to an effective remedy as protected under international human rights law in relation to the alleged adverse impact in this case.
- In PART II we address the facts that are relevant to the NCP's examination. We note that the Submissions (and consequently the expert opinions) are based on inaccurate facts and unfounded factual assumptions. We shall correct such inaccuracies and give an account for the relevant facts.
- In PART III we address the human rights due diligence in connection with the transaction.
- In PART IV we address the responsibility of investors under the Guidelines and respond to the claims and allegations against Aker ASA.
- In PART V we summarise the conclusions regarding the alleged non-compliance with the Guidelines on the part of Aker BP and Aker ASA and offer some final remarks.

[1] The Submissions incorrectly assumes that we have referred to ourselves as "Aker" and use the full names only when referring to one of the companies individually and they have adopted that approach. It then remains unclear to what extent the claims and allegations set out against "Aker" also relate to Aker ASA.

PART I – THE ISSUES

1. The issues under examination

It is evident that the parties have different views on which issues form part of the Specific Instance following the NCP's delimitation. Without going into any detail, we believe this to be the reason that mediation failed. We shall therefore start by specifying the scope of this Specific Instance as we understand it and offer some comments on the complainants' Submissions. The NCP accepted parts of the Complaints, delimiting the issue for further examination to "*human rights due diligence in connection with the transaction*". It was further specified that the human right under consideration is "*the right to remedy a human right in itself*" – as protected i.a. under the International Convention of Civil and Political Rights (ICCPR) Article 2(3).

The scope of the Specific Instance is highlighted in the Initial Assessment as follows:

> *The expectation of carrying out due diligence in connection with an acquisition that may be linked to potential adverse impacts on the right to remedy for victims of alleged widespread human rights violations has not been clarified to any great extent through NCP practices.*

Despite this clear limitation, the complainants' recent Submissions include a second issue:

> *The core of our complaints is that Aker has failed to meet the OECD Guidelines' human rights due diligence (human rights due diligence) 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.*[2]

We shall comment below on the complainants' inclusion of this additional issue in addition to that of the companies' human rights due diligence. The Submissions appear to focus on Aker BP's human rights due diligence but do so on the premise that Aker BP "*has contributed and continues to contribute to adverse human rights impacts*. The complainants invite the NCP first to find that Aker BP did (and does) contribute to an adverse impact on the right to remedy and then examine Aker BP's human rights due diligence in light of "*the failure*" to identify such contribution. The allegation of contribution by Aker BP relies upon a premise that Lundin Energy has caused or contributed to adverse human rights impacts in Sudan during 1999-2003.

2. The conflict between the complainants and Lundin Energy

The Initial Assessment emphasised that "*the specific instance cannot, and is not intended to, resolve the conflict between the complainants and Lundin Energy – a company that is not included in the complaint to the NCP*". It would therefore be useful to clarify the issues that form part of the victims' conflict with Lundin Energy and hence fall outside the scope of the Specific Instance. We note that the complainants' allegations in respect of this conflict are:

(i) That Lundin Energy caused or contribution to human rights violations in Sudan during 1999-2003.
(ii) That Lundin Energy has a legal liability to compensate victims of these human rights violations.
(iii) That Lundin Energy has a responsibility under the Guidelines for addressing adverse human rights impacts in Sudan.
(iv) That Lundin Energy's responsibility under the Guidelines include an obligation to remediate South-Sudanese victims by ways of economic compensation.

[2] Submissions para 2.

(v) That Lundin Energy's *"ongoing denial"* of any responsibility to remedy victims is a breach of the company's obligations as set out in the Guidelines as well as their own policy commitment.

The Initial Assessment pointed out that the allegations against Lundin Energy must be addressed in a procedure involving Lundin Energy (Orrön Energy). The NCP has queried the complainants about their choice not to utilise the NCP mechanism to file a complaint with respect to Lundin Energy[3]: The complainants gave the following response[4]:

> *[…] we have reasons to doubt that an NCP complaint procedure can resolve the dispute between Lundin Energy and those negatively impacted by its business activities. Due to the voluntary and not legally enforceable nature of the Guidelines, the essence of the NCP complaint procedure is dialogue and mediation. In our opinion, this can only be successful when these three criteria are met: 1. Parties share the values that will determine the outcome of process. 2. Parties agree about a robust core of relevant facts. And 3. Parties suspend their judgements and are open and willing to alter earlier positions.*

This response completely overlooks the fact that the dialogue and mediation is merely one side of the Specific Instance. PAX's response also seems to be contradicted by their subsequent statement:

> *[…] we would like to believe that Lundin is sincere when it claims to uphold the Guidelines and the UNGP. While there are reasons to doubt its understanding of their underlying values, we believe that the company deserves the benefit of the doubt.*

Even in the event that Lundin Energy had refused to participate in the process, the NCP would still have examined the facts presented in a complaint and determined whether the allegations were justified. The NGOs would have had an opportunity for a final statement by the Swedish NCP confirming their claims, provided they had been able to substantiate the allegations. As pointed out by John Sherman of Shift, an expert on UNGP and the Guidelines:

> *"NCPs are increasingly recognised as a go-to, non-judicial forum based on 'soft law' principles…but they can also have very hard consequences for companies that don't want to participate."*[5]

3. Complainants' submissions on the adverse impact on their right to remedy

The Complaint against Aker BP (in the Introduction) described the alleged adverse impact as follows:

> *The Complainants assert that Aker BP's acquisition foreseeably compels Lundin Energy to fail its responsibility under the OECD Guidelines as it leaves the company with insufficient means to address severe ongoing (unremediated) impact.*[6]

Two implications should be noted; firstly, that it refers to a potential adverse impact, not an actual one. Secondly, it concerns Lundin Energy (Orrön Energy)'s financial *ability* to compensate victims but not the company's *willingness* to do so. It is acknowledged that the latter would require a resolution of their conflict with Lundin Energy (Orrön Energy). The alleged adverse impact concerns a future event that may

[3] NCP e-mail to PAX 31 October 2022
[4] PAX e-mail to NCP on 1 November 2022
[5] https://www.ibanet.org/article/81d4c3ec-11bc-4c69-9efe-783f265e4433
[6] The Complaint against Aker BP, page 5.

or may not arise. The complainants have explained how they predicts that the potential adverse impact could turn into an actual one:

> *South Sudanese victims of human rights violations publicly claim their right to remedy and reparation since 2016. However, they did not receive a response from Lundin Energy to this day. Their hope is that the facts presented at the trial will oblige the company to comply with its responsibility under the OECD Guidelines.*[7]

The potential adverse impact referred to in the Complaint is "*the foreseeable future failure*" of Orrön Energy to provide remedy at the relevant future point in time. It could only become an actual adverse impact *if and when* Lundin Energy should be compelled to provide remedy but at that time lacks the means to do so. It should also be noted that Orrön Energy's alleged financial incapacity refers to a remediation process under the Guidelines; the complainants do not expect a judicial process to establish a claim for compensation.

The Submissions describe the alleged adverse in other terms:

> *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.*[8]

The underlying assumptions are the same, and we assume there has been no substantial change in the claims as set forth in the Complaint. However, the Submissions go on to state that there is now an actual adverse impact on the right to remedy:

> *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.*[9]

Two implications should be noted from the new description of the adverse impact for which the right to remedy is invoked; firstly, that it has changed from an alleged potential adverse impact to an alleged actual adverse impact. Secondly, that it involves allegations that Aker BP contributed to the alleged actual adverse impact. We shall briefly comment on both, starting with some observations regarding the complainants' inclusion of a claim of contribution on the part of Aker BP.

4. Allegations of contribution by Aker BP

The NCP has specified that the issue to be examined in the Specific Issue is that of the companies' human rights due diligence in connection with the transaction. In the context of a discussion of (their beliefs about) Aker BP's human rights due diligence, the complainants state (in connection with step 6 of the process):

> *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.*[10]

[7] Complaint against Aker BP, para 2.2.
[8] Submissions, para 28 (on page 11).
[9] Ibid, para 25 (on page 13).
[10] Ibid, para 40.

The implication is that Aker BP, allegedly. has a responsibility under the Guidelines to provide remedy to the victims now. The complainants assert that Aker BP's human rights due diligence should have identified that it would be contributing, and consequently should have addressed its alleged responsibility for remediation. Their suggestion is an obligation for Aker BP to remedy a lack of remedy from Lundin Energy. Such claims rely upon the premise that Lundin Energy has a responsibility to provide remedy, and they cannot be examined or concluded without addressing the victims' claims against Lundin Energy.

It should also be noted that the outcome sought by the complainants goes far beyond a finding on the adequacy of the companies' human rights due diligence. They invite the NCP to find that Aker BP contributes to an adverse impact. They further put great emphasis on the Aker BP's own policy commitments and argue that a responsibility to remedy flows from these commitments – thereby implying that Aker BP needs to address remedy even if the NCP declines to draw that conclusion. For the sake of good order, we emphasise that our human rights due diligence did not identify a risk of contribution responsibility for Aker BP to provide remedy, regardless of the outcome of the criminal proceeding or resolution of Lundin Energy's alleged responsibility under the Guidelines.

5. The right to remedy

5.1 The right to remedy in the context of the Guidelines

The responsibility of companies as set out in the Guidelines relates to human rights as they are protected under international law. Chapter IV of the Guidelines sets out the framework for the subsequent recommendations to businesses with respect to human rights: *"Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations […]"*. Before an allegation of a potential adverse impact in the context of the Guidelines can be examined, it must therefore be established whether the human right that is invoked is among the "internationally recognised human rights". As the issues in the Specific Instance are famed, the relevant question concerns the right to an effective remedy as it is protected under international human rights law. An examination of a potential adverse impact stemming from the alleged *"future financial incapacity"* of Lundin Energy (Orrön Energy) to provide remedy, raise the following question: Does the victims' right to an effective remedy extend to a right of protection of funds that could be available for economic compensation, if and when a compensation claim was established? We submit that the protection does not extend this far. Consequently, the human rights impact upon which the Complaint is based, is not encompassed by the Guidelines' recommendations to companies. We refer to the expert opinion of Professor Emberland for an analysis of this issue. His focus is on ICCPR Article 2(3) but he also examines the European Convention on Human Rights (ECHR) Article 13 and other international law instruments addressed by dr. van Ho's expert opinion. We set out his conclusions here:

(i) Based on the standard required for what rights (and corresponding duties) that may be derived from the right to an effective remedy in ICCPR Article 2(3), it is in my opinion not prescient to speak of "denial" and "absence" of relevant effective remedies in this case, and it would further not be appropriate to conclude that effective remedies have been "denied", "absent" or "delayed" before the Swedish legal system has had the opportunity to deal in substance with a claim for compensation.

(ii) The human right to an effective remedy does not extend to a right of protection of funds that could be available for economic compensation if a duty to award compensation is established by a national court.

(iii) Based on the facts and claims set forth in the complaint before the NCP, I cannot see that the right to an effective remedy as a human right is impacted. I reach this conclusion based

on the facts relied upon by the complainants compared to an examination of the nature and scope of the right to an effective remedy as an internationally recognised human right (cf. Ch IV of the 2011 Guidelines).

5.2 The availability of remedies

Professor Emberland points to the remedies that have been, and are, available to the victims to assert their claims against Lundin Energy. We shall briefly address this issue, noting that several of them have already been invoked by the victims. These include:

(i) Investigation

A report setting out the victims' case[11] was submitted to the Swedish prosecutor in 2010 with a plea for criminal investigation:

This report calls for an investigation into the role of the Consortium in the oil war in Block 5A, explains the case for compensation for the victims and argues that the home governments of Lundin (Sweden), Petronas (Malaysia) and OMV (Austria) have failed in their international obligations to prevent human rights violations and international crimes.

The Swedish prosecutor initiated an investigation into the allegations presented by the victims' representatives, spanning more than a decade and ending with an indictment.

(ii) Criminal proceedings to establish liability

On 9 November 2021 an indictment was issued with criminal charges being brought against two executives of Lundin Energy and including claims against Lundin Energy for a corporate fine and forfeiture of profits. Criminal proceedings before Stockholm City Court commenced in September 2023 and are scheduled to be completed in February 2026.

(iii) An arguable claim will suffice

Under Swedish procedural law an arguable claim is sufficient for a claim to be admitted and determined by a court.

(iv) Judicial avenues to address an arguable claim – criminal proceedings

The Swedish court in general allows for civil claims for economic compensation from affected victims of the crimes to be included in criminal proceedings. Claims for compensation were submitted to the Stockholm City Court on 16 and 17 August 2023 by 32 victims. On 22 November 2023 the court decided that the claims for economic compensation could not be included in the pending criminal case, i.a. as they were submitted too late.[12]

(v) Judicial avenues to address an arguable claim – civil proceedings

The Swedish court has explicitly confirmed that the victims' claims may be brought before the court in separate civil proceedings. The victims may, as plaintiffs in civil proceedings, benefit from the state prosecutor's past and future work.

(vi) Enforcement

Swedish law provides for effective enforcement mechanisms once a claim is established.

[11] https://paxforpeace.nl/wp-content/uploads/sites/2/import/import/unpaid-debt.pdf.
[12] Stockholm tingrätt protokoll 22 novemner 2023.

6. Summary of issues and Aker BP's submissions

Having clarified the relevant issues to the NCP's consideration of this matter, we shall briefly summarise our submissions as they will be presented in the remainder of this response.

(i) Aker BP and Aker ASA did meet the expectations of the Guidelines to conduct human rights due diligence in connection with the transaction. An examination of the human rights due diligence that was carried out will show that our findings and conclusions reflect an adequate identification and assessment of human rights impact, based on the relevant facts. Aker BP and Aker ASA correctly did not identify an adverse human rights impact in respect of the right to remedy.

(ii) The protection in international law of the right to an effective remedy does not extend to a protection against the impact allegedly caused by the transaction. Consequently, the impact does not relate to the Guidelines' expectations of companies to respect human rights.

(iii) The facts upon which the alleged adverse impact rely are inaccurate. The facts relevant to an assessment of Lundin Energy (Orrön Energy)'s foreseeable financial capacity to cover the costs of remedy do not support the claim set forth in the Submissions. The cost of remedy is highly inflated and not relevant. The future financial capacities of Orrön Energy have not been assessed at all by the complainants, whose assertions rely entirely on a distorted depiction of Orrön Energy.

(iv) The facts upon which the claim regarding Aker BP's connection to the impact in question rely, are inaccurate and the allegations are unfounded.

(v) Although outside of the scope of the Specific Instance, we will also point out that the review of relevant facts shows that the claim that Aker BP contributed to the alleged adverse impact, is wholly unfounded.

PART II THE FACTUAL BASIS FOR ISSUES UNDER CONSIDERATION

7. Factual premises for the relevant issues

A human rights due diligence shall review relevant facts in order to identify any actual or potential adverse human rights impact and, if any such impact is identified, to address them in accordance with the Guidelines. For the NCP to examine Aker BP's human rights due diligence in connection with the transaction, it is essential that they have the correct facts. The factual premises set out in the Submissions, upon which claim of an adverse impact relies, are for a large part based on inaccurate facts and unfounded assumptions, and even pure speculations.

The central premise for the Complaint is that there is a clear risk, to the point of near certainty, that the transaction would leave Orrön Energy with insufficient funds to address remediation at the relevant future point in time. The claim is that the cost of providing remedy would greatly exceed the financial capacity of Orrön Energy. This is the factual issue that needs to be examined before considering what risk ought to have been identified by Aker BP in its human rights due diligence. It involves two sets of facts; firstly, the cost of remedy, i.e. the likely costs involved for Orrön Energy to fulfil its alleged responsibility for remedy at the relevant point of time, and secondly, the likely future financial capacity of Orrön Energy to meet such costs. The complainants do not discuss any of these issues but merely rely on over-simplified

assumptions and a misrepresentation of Orrön Energy. We shall show that a facts-based assessment would have given a very different result.We shall address the facts relevant to the cost of remedy and Orrön Energy's likely future financial solidity below. Before that we need to correct some fundamental misunderstandings regarding the transaction itself and the transaction process. The Submissions rely on several incorrect factual assumptions, including:

(i) That the transaction was a merger between Aker BP and Lundin Energy AB,

(ii) That Orrön Energy is a spin-off out of Lundin Energy as a single purpose vehicle to hold the potential liabilities related to Lundin Energy's former operations in Sudan, and

(iii) That Aker BP played an active role in Lundin Energy's corporate decisions regarding its continuing business and other internal corporate matters.

In the following, we shall correct these inaccuracies and provide an account of the relevant facts.

8. The transaction

8.1 The target and the roles of various companies involved in the transaction

Contrary to the factual description in the Complaint, the Submissions depict the transaction as a "merger between Aker BP and Lundin Energy AB". This is not correct. The Complaint correctly stated that Aker BP acquired Lundin Energy's E&P assets, mainly the Norwegian subsidiary Lundin Energy Norway AS. For clarification, we shall explain the roles of the various companies involved.

The primary target of the transaction was Lundin Energy Norway AS. The acquisition also included certain holding companies and services companies related to Lundin Energy Norway AS' operations that provided management functions, oil trading services and financing functions. Please see the attached chart showing the legal entities transferred to Aker BP indicated in blue and the ones retained by Lundin Energy (Orrön Energy) in beige (the subsidiaries Karskruv Vind AB and Karskruv Nät AB to the very right in the first figure, are not shown in the second figure although they were also retained.)[13]

For practical purposes the companies that were the target of the transaction were transferred to a new holding company prior to completion of the transaction. The new holding company, referred to as Lundin MergerCo, was wholly owned by Lundin Energy. The transaction was then completed through a statutory merger between Aker BP and Lundin MergerCo. There is nothing unusual about this manner of internal reorganisational steps before completion of a transaction. In most transactions where the target is only a portion of the assets owned by the seller, it is common that the seller will carry out a pre-completion restructuring to organize the assets under a suitable structure.

The various companies involved and their respective roles in the transaction were:

- Lundin Energy AB was the party to the transaction agreement on the seller side.
- Lundin Energy Norway AS owns the Norwegian E&P business and was the primary target.
- Aker BP was the acquiring company.
- Lundin MergerCo AB was a subsidiary of Lundin Energy incorporated as a vehicle to facilitate the implementation of the transaction and this company merged with Aker BP.

[13] Attachment 1: Lundin legal structure before and after the transaction.

- Orrön Energy is the new corporate name for Lundin Energy and the continuing company after the E&P business had been sold.

We shall provide an in-depth description of Orrön Energy and its business below in connection with the assessment of the company's financial capacity following the transaction. However, the Submissions and expert opinions mischaracterisation of Orrön Energy merits a brief comment here. Orrön Energy is portrayed as a spin-off from Lundin Energy, carved out to be a dedicated vehicle for the sole purpose of shielding potential liabilities related to the former Sudan operations, capitalised barely to meet a potential legal liability from the criminal charges, and as close to an empty shell as it could possibly be. This description gives a completely distorted picture. Following the divestment of the E&P business Orrön Energy transformed into a pure play renewables company and remained listed on Nasdaq Stockholm. It is an operative company with a substantial business. In 2019 Lundin Energy had expanded its operations into the renewables sector, changing the company name from Lundin Petroleum to Lundin Energy. The renewables business was further developed during 2020 and 2021. The purpose of the transaction with Aker BP was for Lundin Energy to divest its Norwegian E&P business and retain its other business segment. The real situation is that the Norwegian E&P business was spun off out of Orrön Energy, which continued its remaining business.

8.2 The transaction structure

The complainants argue that 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 - based on this quote from a Norwegian corporate law commentary (overlooking the fact that Lundin Energy is a Swedish public company listed on Nasdaq Stockholm and that the transaction is governed by Swedish law) [14]:

> *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.*

Complainants go on to say that: *"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."*[15] This is a contradiction in terms and must be based on a misunderstanding of company law.

The commercial and legal substance of the transaction is much simpler than what the complainants portray them to be. Lundin Energy wanted to divest its Norwegian E&P business but had no intention of divesting the remaining business. Aker BP was an interested buyer but was unable to pay the full consideration in cash and therefore had to offer a combination of cash and new shares in Aker BP. The parties then negotiated both the *total* consideration amount, and the *allocation* of the consideration between cash and shares. As stated in the stock exchange notice from Aker BP 21 December 2021, the result was as follows: "*The transaction will be settled through a cash consideration of USD 2.22 billion and a share consideration of 271.91 million new shares issued from Aker BP and distributed to the Lundin Energy AB shareholders.*" The allocation between cash and shares was therefore dictated by the commercial negotiation positions, and not by legal considerations or restrictions". To deliver the share consideration, Aker BP needed to issue new shares. The technical mode of completing the share settlement through a merger with the temporary holding company Lundin MegerCo was an efficient way to do so.

[14] Submissions para 4.
[15] Ibid.

8.3 The sales process

Although we do not see the significance of Lundin Energy's reasons for divesting the E&P business nor any reason to speculate on the motive, the following assertion in the Submissions merit a few comments:

> *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" and close up shop.*[16]

Firstly, it was not a decision to "close up shop", but a decision to divest the E&P business and continue the renewables business. Secondly, the market conditions at the end of 2021 were indeed favourable for divesting an E&P business, with a high oil price reflected in the valuation of oil & gas companies. The market conditions were also favourable for companies focused on renewable energy and green industries and the timing was beneficial for transforming into a pure renewable energy company. Thirdly, it was well known that the Lundin group was an active M&A player with the ability to seize market opportunities. A few years earlier Lundin Energy divested its international E&P business to International Petroleum Corporation (retaining all liabilities and responsibilities related to the Sudan operations). In 2019/2020 Lundin entered a transaction with Equinor to buy back shares against cash and divesting interests in Norwegian oil fields (Equinor had held a 20.1% shareholding in Lundin Energy). There had in fact been discussions with Aker BP about a transaction since 2014. The transaction in 2021 is therefore not inconsistent with the corporate and transactional history of Lundin Energy.

Lundin Energy's divestment of its E&P business in 2021 was organised through a structured sales process facilitated by Barclays as financial advisors. A limited number of potential bidders were invited in, including Aker BP. The potential bidders were all invited to provide an indicative bid within 10 December 2021. Lundin Energy later granted Aker BP exclusivity based on an indicative offer, and the parties negotiated a transaction agreement that was announced on 21 December 2021. The complainants assert that Aker BP's had an "urge for a quick negotiation process", which allegedly "precluded an adequate human rights due diligence on the USD 23 billion merger". They quote a statement by Øyvind Eriksen, the CEO of Aker ASA and Chairman of the Board of Aker BP, from an interview in Dagens Næringsliv[17]: *"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."*

What Mr. Eriksen said was that Aker BP had wished for a quick process to clarify whether Lundin was willing to start exclusive negotiations. It is true that the negotiations were completed in a relatively short period of time, which was possible because Aker BP had comprehensive prior knowledge of Lundin Energy Norway due to a significant asset overlap and a close cooperation for several years. The companies were partners in licenses on the Norwegian Continental Shelf, such as Johan Sverdrup, and Aker BP had detailed knowledge of Lundin Energy Norway's E&P assets. Aker BP had monitored Lundin Energy's E&P assets since 2014 to consider a possible business combination and had also followed the Sudan case from public sources. Information about the allegations related to Lundin's former Sudan operations were not new to Aker BP when the negotiation of the final transaction commenced.

8.4 Confidentiality obligations

In this type of a structured sales process, all companies participating in the process must sign customary, strict non-disclosure agreements (NDAs), preventing them from sharing any information with third parties about the transaction process or the information provided by their counterpart during the process. In a competitive process between several potential bidders, the seller will not accept that the bidders disclose

[16] Submissions para 5.
[17] Submissions para 2.

information that can damage the sale process. These legal and contractual limitations precluded any kind of interaction with outside parties about the process during the process of negotiating and conducting due diligence and restrict the sharing of information after the transaction was completed. Contractual confidentiality obligations were continued through similar clauses in the final transaction agreement and consequently Aker BP is still under an obligation of confidentiality vis-à-vis Orrön Energy.

From the point that Lundin Energy and Aker BP entered exclusive negotiations, the potential transaction was deemed inside information for Lundin Energy, Aker BP and Aker ASA. Delayed disclosure, which is a prerequisite for continued negotiations, was only allowed provided that the parties were able to keep the information strictly confidential and take necessary precautions to limit the risk of leakage. Unlawful disclosure of inside information is a criminal offense.

8.5 The negotiations

Understandably, the complainants lack knowledge of the negotiation process, which is confidential and has not been addressed in any public statement. Yet they claim to know details about the parties' discussions.

(i) Firstly, the complainants incorrectly state that no representative of Aker BP was present in the negotiations. Øyvind Eriksen is the Chairman of the Board of Aker BP and Kjell Inge Røkke is a Board member of Aker BP. It is not uncommon that negotiation regarding a potential transaction of such size and strategic importance for the company is conducted by board members rather than the management of the company. Aker BP's CEO, CFO and business development function were also part of Aker BP's team during the negotiations.

(ii) Secondly, without any factual basis, the complainants make bold statements about issues they speculate must have been subject to negotiation and their resolution. For example:

> *The war crimes 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".*[18]

The indictment was not "part and parcel" of the negotiations but was obviously important in relation to a due diligence. The indictment concerned Lundin Energy and its former executives, not the target company Lundin Energy Norway AS or any of its representatives. Mr. Eriksen's statement merely reflects that due diligence was carried out by Aker BP to assess whether the target companies had any connection with the human rights impact allegedly caused by Lundin Energy. We will describe the due diligence below.

(iii) Thirdly, the Submissions make several purely speculative statements to the effect that Aker BP and Lundin Energy should have made joint decisions about matters related to Lundin's business or even that Aker BP should have acted alone in making such decisions on behalf of Lundin Energy:

> *[…] 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.*[19]

[18] Submissions para 7.
[19] Ibid.

> *Aker agreed to spin off Orrön with limited capitalisation […].*[20]
>
> *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.*[21]

No explanation is offered for these assertions. Not only do they lack any foundation in the facts, but they rest on pure speculations and are somewhat contradictory. The suggestion that Orrön Energy was "shaped by Aker" or that Aker was otherwise involved in Lundin Energy's decisions regarding the business that was to be continued after the divestment, simply does not make sense. The transaction structure and the step plan to complete the transaction was developed by Lundin Energy and presented to Aker BP.

The unfounded assertions to the effect that Aker BP should have played an active role demonstrate how the complainants seek to create an impression that Aker BP was somehow involved in Lundin's decision-making process. They follow a pattern of framing the transaction and the negotiating process to support the allegations that Aker BP contributed to an adverse impact and now has a responsibility towards remediation.

8.6 The Indemnity Clause

The complainants' make certain inferences from the indemnity clause in the transaction agreement, and it is also discussed by Professor Ramasastry. We fail to see the relevance of the clause in relation to the issues under consideration in the Specific Instance. It is obvious that an indemnity clause like this does not affect third parties who might have claims against any of the companies. Indemnity clauses are standard in all transaction agreements and in a case like this, where legal claims have been brought against the selling company, it would be customary to include a specific indemnity related to the issues that are subject to legal proceedings. This is not a reflection that any such risk has been identified, nor of any risk being transferred to the target or the buyer. Even an unfounded claim against Aker BP would imply costs, which Lundin Energy has undertaken to reimburse. Professor Ramasastry sees the indemnification as *"an empty commitment"* since *"there do not appear to be any funds available"* in Orrön to address any claims related to human rights. We assume she has been misinformed about the financial status of Orrön Energy, which today has a market capitalisation of SEK 2 billion. If anything, the indemnity clause demonstrates Aker BP's faith in the financial robustness of Orrön Energy.

9. Lundin Energy

9.1 Lundin Energy's distribution of dividend

As seller, Lundin Energy set the premises for how the transaction was structured. Since the objective was to sell the E&P business and create a pure-play renewables business, it was a premise for the structured sales process that Lundin Energy would not continue as a shareholder in the combined company (Aker BP) and that the Aker BP shares would therefore be distributed as dividend prior to completing the merger. While it is correct that there was a significant reduction in the net asset value of Lundin Energy following the transaction, this is not a result of Aker BP's acquisition but of Lundin Energy's distribution of dividend as a lex Asea dividend pursuant to Swedish law. The recipients of the dividends transferred out of Lundin Energy were the company's shareholders. Aker BP has not received any dividends and paid consideration for the assets that have been acquired. The transaction saw no change in the value of Aker BP (other than an increase in share price following the announcement). The timing and the size of the dividend

[20] Submissions, para 28 on page 16.
[21] Ibid., para 12.

distribution was a decision made solely by Lundin Energy. It should also be noted that were a dividend not to be distributed before completing a transaction, it could instead be implemented after – in which case it would be wholly unrelated to the transaction process as such.

Swedish company law sets out strict legal requirements and procedures to be observed in connection with a dividend proposal, including legal provisions aimed at protecting the interests of current and future creditors of the company. A dividend decision requires several corporate steps and corporate bodies are under a legal responsibility and liability for fulfilling the relevant requirements:

(i) The Board is responsible for assessing that the requirements for a dividend are met. The Board has a legal duty to ensure that the dividend distribution would not leave the company unable to meet current and future obligations and liabilities.

(ii) The Board shall submit a report to the General Meeting setting out their assessment.

(iii) The company's independent statutory auditors shall present a report to the General Meeting in which they assess and endorse the proposed dividend.

(iv) The General Meeting must approve the proposed dividend with a two thirds majority.

(v) All shareholders can make shareholders' proposals to the Annual General Meeting and provide information to support or advice against the proposal.

All these rules and requirements were observed in connection with Lundin Energy's resolution to distribute dividend. At the time that the distribution of dividend was considered by the various corporate bodies, criminal proceedings had been issued against two Lundin executives, also involving claims against the company. Bearing in mind the legal duties of the corporate bodies, it is obvious that the possibility of any potential financial obligations related to the company's alleged human rights impacts in Sudan would be part of the considerations in connection with a dividend decision – be it by the Board, the independent statutory auditors or the shareholders at the General Meeting. To suggest otherwise would imply negligence and breach of legal duties, which would carry its own legal ramifications.

9.2 Notification to Lundin Energy's shareholders of the victims' claim for remedy

It should also be noted that prior to the dividend resolution, Lundin Energy, its Board and the shareholders were explicitly put on notice by PAX of the victims' claim for remedy. PAX has been a shareholder of Lundin Energy for years and has over time made several shareholder proposals. Ahead of the Annual General Meeting on 31 March 2022, PAX had presented a shareholder proposal that reiterated the victims' claim for remedy from Lundin Energy in the estimated amount of MUSD 700. The information about the estimate is relevant and will be discussed below. The point here is that the complainants (PAX) had the taken the opportunity to provide information about the victims' claim to the Annual General Meeting, requesting that it be considered by the shareholders and reflected in their vote.

The shareholders of Lundin Energy included several major institutional investors with their own commitments to human rights due diligence. The transaction and proposed dividend were adopted at Lundin Energy's Annual General Meeting on 31 March 2022 with the required two thirds majority. It can be noted that the Lundin family held about one third of the shares and that most of the institutional investors, including major banks and pension funds, voted in favour of the transaction and the dividend (and against PAX's shareholder proposal).

10. The cost of remedy

10.1 The nature of remedy

The first crucial factual issue underpinning the claim of a "foreseeable future failure" by Orrön Energy to meet a claim for remedy is an assessment of the amount that would be required, i.e. the cost of remedy. The complainants' assertions regarding this issue rely entirely on a loose estimate made by PAX. Before turning to the estimate itself, we shall address the underlying assumptions regarding the nature of remedy that would be relevant. Without further discussion, PAX assumes that the cost of remedy should be estimated by counting various types of losses incurred 20 years ago and calculating damages in the manner of a legal claim for compensation. This approach is at odds with the complainants' own approach to remedy as set forth in the Complaint. They do not assume that a judicial process would be the relevant procedure for addressing the victims' claim against Lundin Energy. Rather, they refer to Lundin Energy's responsibility under the Guidelines to address its alleged adverse human rights impact. This refers to an expectation that a company *"provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts"* that the company has caused or contributed to.[22] Remedy under the Guidelines comprise a wide range of measures. Reparation can be one, including economic compensation, but hardly in the manner assumed by the complainants. We cannot see that the complainants' approach to the cost involved in remediation here is particularly relevant for estimating the costs involved for a company to participate in a remediation process as recommended in the Guidelines.

Another premise which is central to the argument about Orrön Energy's foreseeable financial incapacity is that remedy would require a one-off payment of a very substantial size. That potential reparation under the Guidelines to a population that 20 years ago comprised an estimated 160 000 people must come in the form of a one-time payment of a billion-dollar figure, is a completely unrealistic scenario. It seems more realistic that any measures to aid the population in question would be directed at long-term financial support to relevant projects in South Sudan aiming at improving living conditions for the population. Such support would require financial contributions of more limited amounts over a longer period.

With these qualifications regarding the relevance of the complainants' approach, we shall address the estimated cost of remedy on the complainants' own premise.

10.2 PAX's estimate of the costs of remedy

The costs involved in providing remedy is obviously one of, if not the most crucial factual issues underpinning the Complaint. Yet it is not addressed beyond one single sentence, stating that: "*The only available estimate is MUSD 1.787*".[23]

The sole reference provided for this statement is to a website operated by PAX: https://unpaiddebt.org. (all the following quotes are from this website). The figure stems from a rather vague estimation made by PAX and published on the website, without further references or substantiation, neither in the form of documentation nor underlying information to back up the figures. The estimate appears to be calculated by PAX alone, who described its relevance as follows:

> *The exact amount of these damages and the attribution of liability should be determined by independent experts. This incomplete and rather modest estimate may give an impression of the likely magnitude.*

[22] Ch. IV, para 6 of the Guidelines
[23] Complaint against Aker BP page 13, repeated in the Submissions para 12.

We shall revert to the reference to attribution of liability and first deal with the estimate itself. We first note that PAX seeks to hold the oil companies solely responsible for human rights violations perpetuated by the Sudanese army and militia groups during an ongoing civil war – which is an improbable starting point for an obligation to remedy. The damages are described as follows:

> *The cost of the war in Block 5A from 1999 to 2003 was quite significant. It can be measured in terms of deaths, disease, injuries, displacement, damage to family life and property, destruction of communities, disease, and loss of future and potential assets such as the education of children, the training of future leaders, and the ability to benefit from the many life opportunities that did not come due to the war.*

This is a very broad concept of damages. The list consists of various types of losses, each of which is attached a round figure representing the monetary value and a round figure representing the incurrence. Some are material items, such as houses and cattle, and some are non-material such as "loss of opportunities". The categories are vague and some of them may seem to overlap. Not only is there a total lack of documentation or other substantiation; there is also no explanation whatsoever for the calculation.

A closer look at the calculation further reveals that the estimate of MUSD 1.787 includes "accrued interest over 17 years" at 98%, with the result that about 50% of the estimated amount represents interest. It is difficult to see how a calculation of interest would be a relevant factor in the context of remedy under the Guidelines to address impacts of 20 years ago. Discounting the interest component, PAX's estimate of the total damages of warfare is about MUSD 900 – which also is flawed for reasons we explain below.

10.3 The estimate presented by PAX prior to the Complaint

PAX's report referred (in the quote above) to "the attribution of liability". There were two other foreign oil companies in the consortium operated by Lundin in Sudan – the Austrian company OMV and the Malaysian company Petronas. PAX's report allege that all three companies, as well as their investors, have a financial responsibility towards victims:

> *The members of the Lundin Consortium and their investors have a debt to pay to the people who were severely harmed by the war that they contributed to and benefitted from. Lundin Energy can be held fully liable for these damages, in which case its debt would be MUSD 1,787. It can also be argued that its business partners Petronas and OMV share the responsibility in proportion to their stake in the Lundin consortium, in which case Lundin's debt could stand at MUSD 714, the debt of Petronas at MUSD 500, and that of OMV at MUSD 464.*

The possibility that Lundin's alleged financial responsibility towards victims is estimated at MUSD 714 rather than MUSD 1.787 is completely left out in the Complaint as well as in the recent Submissions.

However, the estimate PAX communicated to Lundin Energy as well as the Aker companies in 2022, shortly before the filing of the Complaint, is based on the latter figure. In PAX's shareholder proposal to the Annual General Meeting at which the dividend proposal was to be approved, it stated:

> *The merger with Aker BP will dramatically reduce the net asset value of the Company. Among the known liabilities of Lundin Energy after the merger are the costs of three legal defence teams and forfeiture of MUSD 150 in criminal revenues. The available estimation of the costs of a remedy process is MUSD 700.*[24]

[24] Attachment 2: Shareholder proposal from PAX to the Annual General Meeting, Lundin Energy AB, dated 9 February 2022.

PAX, along with several other NGOs, also wrote a letter to Aker BP and Aker ASA following the meeting in March, in which they stated:

> *Lundin Energy's fair share in damages due to human rights violations is estimated at MUSD 700 million. Based on the available information, if found guilty, Lundin Energy will not have sufficient assets to fulfil its human rights obligations.*[25]

The repeated reference to an estimate of MUSD 1.787 and insistence in this Specific Instance that this is the only available estimate of the costs of a remedy process is remarkable, to say the least, given that this figure is about 2,5 times the amount they presented to Lundin Energy as well as Aker BP and Aker ASA a few months before filing the NCP Complaint.

10.4 PAX's calculation and the need for independent evaluation

We have shown that PAX's estimate for costs of remedy does not stand up to scrutiny. Firstly, 50% of the amount constitutes "accrued interest", which is not a relevant factor in this context. Secondly, the reference to the estimate as basis for calculating Lundin Energy's responsibility does not reflect the attribution of liability between the three oil companies. This approach to Lundin Energy's alleged financial liability is also contradicted in PAX's recent communication with the companies. When attributing the liability in accordance with the estimate presented to both Lundin Energy and the Aker companies and discounting the interest, the figure stemming from PAX's list would be in the range of MUSD 360. We reiterate our observation that this type of calculation of damages would not be relevant at all for a remediation process under the Guidelines. With that caveat, we have nevertheless examined the factual basis for PAX's claim that the cost of remedy would be (at least) MUSD 1.787. A more accurate result of PAX's own calculation would only be a fraction of that amount.

PAX had emphasised that the estimate of damages must be determined by independent experts, yet there seems to have been no attempt at obtaining such evaluation during the seven years that has passed since the estimate was presented. The complainants now suggest that the figure they present does not even merit an examination:

> *The only available estimate of their damages is MUSD 1.787. 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.*[26]

The reality is that there exists no realistic estimate but the one thing that seems certain, is that PAX's estimate – whether it be MUSD 1.787 or MUSD 700 - is highly inflated. Moreover, regardless of the inaccuracy of their estimate, the complainants' approach to calculating costs involved with a remediation process under the Guidelines is not particularly relevant and is thus unsuited as a point of reference in the Specific Instance.

11. Orrön Energy AB's financial capacity

The second crucial factual issue underpinning the claim of a "foreseeable future failure" by Orrön Energy to meet a claim for remedy is an assessment of Orrön Energy's likely future financial capacity. The complainants assert that the company, with almost certainty, would not have the funds required for remedy. They offer no analysis or assessment apart from a reference to the net asset value of the company

[25] Attachment 3: Letter by PAX et.al. to the Chairman of the Board and CEO of Aker BP, and the Chairman of the Board of Aker ASA, dated 24 March 2022.
[26] Submissions, para 21.

immediately following the transaction and deducting the forfeiture claim. Their approach to assessing Orrön Energy's future financial capacity is flawed and not supported by the facts.

11.1 The mischaracterisation of Orrön Energy

The complainants rely entirely on a misguided perception of what type of company Orrön Energy is. The Submissions, as well as the expert opinions, repeatedly mischaracterise Orrön Energy and its purpose, using descriptions such as a spin-off carved out from Lundin Energy as a single-purpose, dedicated vehicle conveniently set up to hold the risks and liabilities that could arise from the accusations of human rights impacts in Sudan. This is a completely distorted picture of the nature and purpose of the company. The complainants evidently see no reason to considerer any facts about the company and its current and future business activities when making assumptions about its financial solidity.

The complainants' allegation that Orrön Energy was deliberately capitalised with just enough funds to (barely) cover the costs of legal proceeding and pay the forfeiture claim is misguided. The assets and cash amount retained after the divestment of the E&P business was not tailored to be set aside to meet a potential future forfeiture claim. Rather, it constituted working capital intended to grow the business to create value over the coming years. Whether or to what extent Lundin Energy will have to pay forfeiture would not be clarified for many years, by which time the company is expecting to have experienced a significant growth.

Any analysis based on these misconceptions will necessarily fall short of assessing the real issues related to Orrön Energy, which is Orrön Energy's likely future solidity and financial capability. In the following we shall give an account of the nature of Orrön Energy and its business.

11.2 Orrön Energy's business

In 2019 Lundin Energy had expanded its field of operations into the renewables sector, following an industry trend of oil companies expanding to other energy sources. Following the divestment of its Norwegian E&P business in 2022 the company would transform into a pure play renewable energy company. The strategy was publicly communicated through a "Company Description of the Renewable Energy Business of Lundin Energy AB":

https://www.orron.com/wp-content/uploads/2022/05/ot_renewables_IM_e.pdf.

This report was published in the first quarter of 2022 and was thus available for the complainants' when preparing the NCP complaints. The report provides an extensive description of the foundation and plans for transforming into a pure play renewables company. Significantly, there would be continuity both in senior management and Board members. Orrön Energy's website describes the company as follows:

> *Orrön is an independent, publicly listed renewable energy company within the Lundin Group of Companies. Orrön Energy's core portfolio consists of high quality, cash flow generating assets in the Nordics, coupled with greenfield growth opportunities in the Nordics and Europe. With significant financial capacity to fund further growth and acquisitions, and backed by a major shareholder, management and Board with a proven track record of investing into, leading and growing highly successful businesses, Orrön Energy is in a unique position to create shareholder value through the energy transition.*[27]

[27] https://www.orron.com/

Orrön Energy employs around 260 people, has substantial business operations and a solid financial standing to expand through new acquisitions in line with the business plan. Orrön Energy has been provided a revolving credit facility of MEUR 100 with Skandinaviska Enskilda Banken. The company has developed according to the initial business plan and the first year of business showed a 260% increase in production. Extensive information about Orrön Energy and the development of its business through the first half year after transforming into a pure renewable energy company can be found in the Annual and Sustainability Report for 2022, confirming that Orrön Energy quickly developed as forecasted, see:

https://ml-eu.globenewswire.com/Resource/Download/8dda4533-4652-4ec4-9fa4-f25482bc77f4.

For easy reference, we set out the highlights here:

- *Built a portfolio of operating assets through seven acquisitions, transforming the Company's business in Sweden and increasing annual power generation by over 500 GWh to a total of 800 GWh by year end 2022.*
- *Established an experienced organisation and organic growth platform in Sweden with the knowledge, network and competence to operate and optimise the asset base, continue growing through acquisition and extend asset lifetimes through repowering, life extension and expansion projects.*
- *The Karskruv project remains on track for completion by end 2023 with construction activities ahead of schedule and will deliver an additional 290 GWh of annual power generation, bringing the Company's annual estimated power generation to 1,100 GWh from 2024 onwards.*
- *Added new opportunities to increase the power generation capacity of the Company including greenfield projects, and expansion projects with wind, solar and battery storage within the existing asset base, with the aim of becoming a full cycle renewable energy company with a significant long-term growth pipeline.*
- *In early 2023, the Company expanded its geographic footprint to France and Germany in addition to the Nordic portfolio with the intention of expanding further into Europe.*

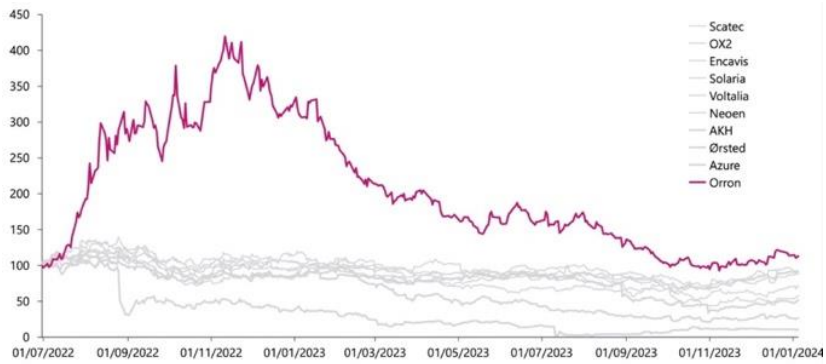
Despite abundant information being available in the public domain, there is no trace neither in the Complaint nor the Submissions of any kind of financial analysis of Orrön Energy's business, its current and future operations, business strategy, results so far, plans for further growth etc. Towards the end of the Submissions the complainants seem to accept the fact that Orrön Energy is not a single-purpose vehicle but an operative company with substantial activities, when they say: "*there are too many unknowns to predict whether Orrön Energy will prosper or go bust because of these risks and liabilities*".[28]

Yet the argumentation regarding Orrön Energy's alleged financial incapacity rely entirely on the distorted depiction of a company without substance. There are obviously many unknowns about the future, but this does not prevent a meaningful analysis of a company's likely financial development. Indeed, there are professionals whose business it is to predict whether a company is likely to "prosper or go bust". The general market view reflects a positive outlook for renewables in the next years and decades as demand for renewable energy sources continues to grow. Upon completion of the transaction, investors continued to trade and invest in the share based on their analysis of available information about the company's renewables assets and strategy for future growth, demonstrating a belief that the company would continue to prosper.

Through the second half of 2022 there was a significant increase in the share price, well over the rest of the market. The steep increase demonstrates investors' confidence that Orrön Energy was well placed for

[28] Submissions, para 11.

long-term value creation The share price has since decreased in line with the market trend, although the Orrön Energy share has consistently performed above the market:



Many of the large institutional investors of Lundin Energy continued as shareholders, along with new institutional investors in Orrön Energy. The largest shareholders as of 31.12.2022 were:

The 10 largest shareholders 31.12.2022	*Percent (rounded)*
Nemesia[29]	33.39
Avanza Bank Holding	2.65
BlackRock, Inc.	2.06
E. Öhman J :or Fonder	1.90
JP Morgan	1.87
Norges Bank	1.44
Lombard Odier	1.38
Santander	1.26
Swedbank AB	1.18
Lansdowne Partners	0.97
The 10 largest shareholders	*48.10*

Had the transaction left Orrön Energy as the company portrayed by the complainants – a single-purpose company designed as a vehicle to hold liabilities - it would not have qualified as a listed company on Nasdaq Stockholm and would not have been attractive to investors – old or new.

12. Consequences of the factual review

12.1 Summary

We have provided an account for and substantiation of the relevant facts for an assessment of the potential adverse impact on the right to remedy in the form of "*a foreseeable future failure*" by Orrön Energy to meet the cost of remedy if and when it should materialise. The relevant facts deviate significantly from those set out in the Submissions. The misconceptions reflect in the analysis and conclusions of the complainants as well as their experts. To summarise the most crucial factual inaccuracies:

(i) The target of the transaction was Lundin Energy Norway AS, not Lundin Energy.

(ii) Orrön Energy is not a single-purpose vehicle but the new name for Lundin Energy, which transformed into a pure play renewable energy company and continued to operate and further develop this business after divesting the Norwegian E&P business.

[29] An investment company wholly owned by Lundin family trusts. Source: Q4 Inc.

(iii) The alleged adverse impact is the reduced asset value of Lundin Energy (Orrön Energy) following the transaction, which was caused by Lundin Energy's decision to distribute the merger consideration as dividend.

(iv) The claim that Lundin/Orrön Energy would be financially incapable of providing remedy to the victims rests on two factors: the estimated cost of remedy as compared the estimated future financial capacity of Orrön Energy. Both are inadequately addressed in the Complaint as well as the Submissions. The assumptions upon which the complainants base their assertions, are entirely flawed.

(v) The complainants' approach to the cost of remedy does not reflect the nature of a remediation process under the Guidelines. They presume the cost of remedy to be a matter of calculating damages related to losses incurred 20 years ago, even adding 100% interest, and do not address the question of what types of remediation process or reparation measures would be relevant under the Guidelines.

(vi) Even on the premise that this approach could be relevant, it is clear that the estimate of MUSD 1.787 is completely irrelevant. For one, the estimate itself is unsubstantiated and highly inflated. Moreover, the figure is significantly higher than the one presented to Lundin Energy and Aker BP a few months prior to filing the Complaint. There is no explanation why the complainants choose to contradict themselves in this way, other than perhaps trying to support the assertion that Orrön Energy, with great certainty, would lack the necessary funds for remedy. Applying Pax's own figures and method of calculation, the amount would be approximately MUSD 360 – which probably is also too high, given the vagueness of the list of damages. Hence, even if PAX's approach and figures are taken at face value, the result of the calculation would be but a fraction of that presented by the complainants in the Specific Instance.

(vii) The Complaint, as well as the Submissions, lack any form of analysis when assessing the future financial capacity of Orrön Energy but merely points to the company's net asset value immediately following the divestment and distribution of dividend and the entirely flawed premise that Orrön was set up as a single purpose vehicle void of any content.

12.2 The relevance of the expert opinions

The expert opinions provided by the complainants rely on the same inaccurate facts as the Submissions and must be read with that in mind. Professor Ramasastry describes the background facts for her analysis as follows:

> *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") […].*[30]

Her expert opinion addresses the expectations of human rights due diligence in connection with mergers and acquisition, which are described as the process to identify and address salient human rights impacts caused or contributed to *by the company being acquired* (the *target* company):

> *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,*

[30] Expert opinion of Professor Ramasastry, para 5.

> *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.*[31]

Every interpretative guide and other sources referred to in the expert opinion, as well as her examples of good company practice (Sasol), describe human rights due diligence in connection with mergers and acquisitions as identifying and addressing risk connected to target. For example:

> *The Sasol guidance outlines the types of issues that Sasol as a purchaser should examine of a target company. […] 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."*[32]

Professor Ramasastry's analysis of human rights due diligence in the context of the merger led her to theh following conclusion, for which she finds support in an interpretive guide to the UN Guiding Principles published by the UN Office of the High Commissioner for Human Rights (second quote):

> *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.*[33]

> *[…] 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*** (her emphasis).

The company being acquired by Aker BP was Lundin Energy Norway (and certain associated companies). The target company had no links to the alleged human rights violations in Sudan and therefore no unresolved human rights issues. This was confirmed by Aker BP's human rights due diligence. While her expert opinion explores many relevant issues, Professor Ramasastry's analysis and conclusions with respect to the application of the Guidelines to this specific transaction are misguided as they are based on inaccurate factual premises about the company being acquired (as well as the nature of the continuing company (Orrön Energy). Since Professor Ramasastry's analysis is based on flawed premises, her conclusions must be read with that caveat.

The expert opinion also addresses an acquisition in the form of an asset purchase agreement:

> *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.*[34]

Applied to this case, the situation referred would be that Aker BP had acquired the E&P assets of Lundin Energy Norway instead of the company as such. If implying that the transaction thereby should be

[31] Ibid, para 36.
[32] Ibid, para 21.
[33] Ibid, para 39.
[34] Ibid, para 41.

considered as an asset purchase agreement whereby Aker BP acquired the assets of Lundin Energy, this is not the situation referred to in the quote. It does not matter that the companies acquired from Lundin Energy represented 98% of the selling company's value at the time; what matters is the remaining assets and continuing business.

12.3 Aker BP did not contribute to an adverse impact

Professor Ramasastry's misconception of the facts has led her to conclude that the relevant issue in respect of Aker BP's human rights due diligence is that of Aker BP's contribution to an adverse impact:

> *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.*[35]

It is obvious that Professor Ramasastry has been provided with an incorrect set of facts, which unfortunately has misguided her discussion of the issues under consideration and renders many of her conclusions regarding the expectations of Aker BP under the Guidelines, irrelevant.

Although the allegation of Aker BP having contributed to an adverse impact is not an issue to be examined in the Specific Instance, we will point out that a review of the relevant facts shows that there is no basis for this claim. The Submissions, as well as the expert opinions provided by the complainants, simply assume that there was a real risk that Aker BP through the transaction would contribute to an adverse impact on the right to remedy and that the company's human rights due diligence therefore must be analysed in that context. The expert opinion of Professor Ramasastry also discusses how direct linkage to an adverse impact through a business relationship could turn into a situation of contribution and suggests that this is the case here.[36] The OECD Due Diligence Guidance ("the Guidance") points to a failure to conduct proper human rights due diligence and address existing adverse human rights risks as a situation that could turn "direct linkage" into "contribution". The example from the Guidance is not particularly relevant in the context of mergers and acquisitions, where the business relationship is short-lived. That the relationship to an adverse impact "may change, for example as situations evolve", is clearly a reference to long-term business relationships.

PART III AKER BP'S human rights due diligence

13. Initial observations on the application of the Guidelines

The complainants have on several occasions pointed out that the parties' interpretation of the Guidelines may differ, and they have now provided an expert opinion by Professor Ramasastry concerning the application of the Guidelines in connection with mergers and acquisitions. Firstly, she points out that to meet the expectations set out in the Guidelines (as well as the UNGPs) a company should conduct human rights due diligence during merger and acquisitions.[37] We agree. There is not, and has never been, any disagreement on this issue. We also agree with Professor Ramasastry that a human rights due diligence in connection with mergers and acquisitions means addressing any human rights impacts connected to the company being acquired (the target). We note that this principle is reflected in all the various guidance documents she has consulted and in her examples of company practices.

[35] Ibid, para 26.
[36] Ibid, para 23.
[37] Ibid, para 17.

The Guidelines are not intended to provide a rigid set of norms that must be closely adhered to, but rather a flexible set of recommendations to be adapted to the concrete circumstances. Anna Triponel, a renowned business and human rights lawyer with a background from corporate law, has pointed to some of the challenges in adapting the Guidelines to mergers and acquisitions:

> *Any M&A lawyer undertaking this work will know, there are some very real challenges to integrating human rights into M&A processes in a systematic and business-friendly manner. To be successful, an approach to integrating human rights into M&A needs to acknowledge these challenges and build on them so that the proposed process reflects the essence of how M&A transactions are conducted.*[38]

Before giving an account for the human rights due diligence Aker BP conducted in connection with the transaction, we shall set out the understanding of the Guidelines that informed Aker BP's approach to human rights due diligence.

(i) A human rights due diligence needs not be set up as a separate process. Ch. II, para 10 of the Guidelines explicitly says that companies should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts […]. Hence, the question is not what the process is called, but the extent to which it, as a matter of fact, meets the expectations set out in the Guidelines.

(ii) In mergers and acquisitions there is already an established procedure for conducting due diligence and an integration of human rights issues into this process is the natural, and recommended, approach.

(iii) A fundamental principle underpinning the recommendations of the Guidelines is that the scope and nature of the human rights due diligence must be adapted to the context and circumstances of the situation, as reflected in the Guidance:

> *The OECD Guidelines for MNEs provide enterprises with the flexibility to adapt the characteristics, specific measures and processes of due diligence to their own circumstances.*[39]

(iv) The recommendation of the Guidelines is perceived to be tailored on the typical supply chain business relationships. This is a general observation, exemplified by this quote from the OECD Guide to responsible business conduct for institutional investors:

> *Some of the language used in the OECD Guidelines is more targeted to suppliers and buyers in supply chains (e.g. in manufactured products), rather than investors and investee companies in an investment value chain. The relationship between an investor and an investee company is qualitatively different from the relationship between purchaser and supplier companies.*[40]

A similar observation is relevant to the merger and acquisition situation.

(v) The business relationship between the seller and buyer in a merger or acquisitions situation is short-lived. The business relationship exists in the negotiation phase and ends upon the

[38] https://uk.practicallaw.thomsonreuters.com/w-020-2360?transitionType=Default&contextData=(sc.Default)&firstPage=true
[39] OECD Due Diligence Guidance, page 9.
[40] OECD Guide to responsible business conduct for institutional investors, page 7.

completion of the transaction. A human rights due diligence in this context will therefore, in some respects, differ from those typical for long term business relationships.

(vi) Other factors that influence the context for human rights due diligence in relation to mergers and acquisitions relate to the timespan, as the period for negotiating a transaction will be relatively short. Limitations are also posed by confidentiality obligations and insider information regulations. As pointed out by Anna Triponel:

> *The tight timing and confidentiality on M&A deals makes it particularly challenging to take the time to fully assess human rights risks.*[41]

(vii) The focal point for a human rights due diligence in relation to mergers and acquisitions is on the company/companies being acquired (target) and their potential human rights impacts (as confirmed by Professor Ramasastry's expert opinion).

(viii) The six-steps process was introduced by the Guidance as a tool to assist companies in setting up systems for their human rights due diligence processes and is also largely shaped on the typical long-term business relationships. It is explicitly stated in introduction to the six-step process the Guidance that not all steps will be relevant in all situations:

> *The practical actions provided are not meant to represent an exhaustive "tick box" list for due diligence. Not every practical action will be appropriate for every situation. Likewise, additional practical actions or implementation measures not described in this Guidance may be useful in some situations.*[42]

(ix) The issues to be addressed in a human rights due diligence, i.e. actual potential human rights impact on third parties affected by the transaction, will often overlap, fully or partly, with issues that are also relevant from a company perspective. The OECD Guide to responsible business conduct for institutional investors points out that financial risk and human rights impact risk would often be aligned, which calls for an integrated due diligence process:

> *[There will] often be a strong alignment between financial materiality and RBC risk and thus integration of RBC risk management into existing financial risk analysis and management can be advantageous.*[43]

(x) In a case where there are known human rights issue, any human rights impact on third parties would also pose a potential legal, financial, and reputation risk both to the target company and the acquiring company. Consequently, the due diligence would include steps to identify and assess risks of adverse human rights impact on third parties, even if the starting point is taken in risk for the company.

13.2 Aker BP did carry out human rights due diligence

The Complainants assert that no human rights due diligence was carried out by Aker BP. That is not correct. They seem to rely on (i) the fact that they did not find any traces of a human rights due diligence in the public domain; (ii) that the term "*human rights due diligence*" was not used in public documentation about the transaction, (iii) quotes from oral and written public statements by Aker BP following the

[41] https://uk.practicallaw.thomsonreuters.com/w-020-2360?transitionType=Default&contextData=(sc.Default)&firstPage=true
[42] OECD Due Diligence Guidance, page 21.
[43] OECD Guide to responsible business conduct for institutional investors, page 22.

announcement, (iv) references to meetings the NGO's had with the Aker companies, and (v) the absence of substantive account of Aker BP's human rights due diligence in our Initial Response. As regards the last issue, we reiterate that our Initial Response addressed the procedural aspects regarding admissibility and no inferences can be made regarding substantive issues that were not addressed. With respect to the public information, it is common practice to refer to the existence of a due diligence but not to publicly describe the due diligence in any detail. As explained above, some of the quoted statements by Aker BP representatives did in fact reflect findings of our human rights due diligence.

As for the meetings between the NGOs and the Aker companies, it should be noted that references were in fact made to Aker BP's human rights due diligence. It was pointed out that the allegations against Lundin Energy for alleged contribution to human rights violations were well-known to Aker BP prior to the transaction and that human rights impacts had been addressed in the due diligence. We conveyed the conclusion that none of the companies acquired by Aker BP had any connection to or responsibility for the human rights impact in Sudan. It was also stressed that Aker BP considered Orrön Energy a robust company. All of the above are references to a human rights due diligence. The fact that the term human rights due diligence was not used is obviously not of relevance, as the process had been integrated in pour overall due diligence. The complainants also put great emphasis on a purported statement Karl Johnny Hersvik, CEO of Aker BP. Their submissions regarding this dialogue differ from the Aker participants' recollection. It was not a formal dialogue, and no admissions were made by Aker BP.

In the following we shall give an account for our human rights due diligence that will demonstrates that Aker BP met the expectations set out in Ch. IV para 5 and Ch. II para 10.

13.3 Aker BP's human rights due diligence – approach and method

We start with an overview of the approach to and starting point for the human rights due diligence. As already pointed out, it was an integrated part of our overall due diligence in connection with the transaction. The issues related to human rights impact were aligned with issues included in this due diligence, for reasons that will be further explained below. The focus of our human rights due diligence was on the target of the transaction and its connection, if any, to the human rights impacts in question. Aker BP's due diligence also addressed certain issues not related to the target, including the financial robustness of Lundin Energy/Orrön Energy after the transaction.

As part of the due diligence, relevant documents were reviewed and several key persons were interviewed. We gathered information from persons with detailed knowledge of the allegations made against Lundin Energy regarding human rights impact of its operations in Sudan. The issues that were examined as well as our findings and conclusions were set out in internal memos, that formed part of our internal due diligence documentation. Due to our ongoing confidentiality obligations, we are not able to share the content of the documents reviewed, information gathered from the interviews, or our own reports on the human rights due diligence. In the following we shall give an account of Ake BP's human rights due diligence and our findings on the relevant issues:

13.4 Starting point for identifying risk

The following observations formed our starting point for assessing potential human rights impacts:

(i) We were fully aware of the allegations about human rights impacts of Lundin Energy's former operations in Sudan. The potential liability and responsibility related to these allegations, including any obligation to compensate victims, would remain with Lundin Energy.

(ii) It was observed that Lundin Energy had always refuted any responsibility for contribution to human rights violations in Sudan and intended to defend themselves in court. It was also observed that Lundin Energy did not consider there to be grounds for civil claims or any other obligations or responsibility to compensate victims.

(iii) Regardless of Lundin Energy's position, the nature of the allegations and the fact that an indictment had been issued identified a risk related to human rights impact that needed to be considered in connection with the transaction.

(iv) It was not neither necessary nor possible to conduct an independent examination of the facts upon which the indictment against Lundin Energy is based. As pointed out by the complainants and their experts, the allegations themselves and the indictment was a "red flag" and needed to be addressed as part of the human rights due diligence.

13.5 The target company's possible connection to the human rights impacts

With the risk already identified as the starting point for a human rights due diligence we needed to identify and assess any possibility of there being a connection between the companies acquired by Aker BP and the human rights impacts allegedly contributed to by Lundin Energy[44]. As explained by Professor Ramasastry, the human rights due diligence in connection with mergers and acquisitions involve an assessment of the target company's possible connection to adverse human rights impacts. Any such connection would obviously imply risk to Aker BP as the acquiring company and the issues to be examined were therefore fully aligned. Our assessment was based on the following observations and findings:

About the target company Lundin Energy Norway AS:

(i) Lundin Energy Norway AS was incorporated in 2003. It was established in connection with (then) Lundin Petroleum's acquisition of petroleum licenses from Det Norske Oljeselskap AS ("DNO")[45]. The Norwegian assets acquired from DNO consisted of a portfolio of production, development and exploration assets on the Norwegian Continental Shelf.

(ii) At the time of the transaction, it was reported that Lundin Petroleum funded the acquisition from DNO of its British and Irish subsidiaries as well as the Norwegian assets with borrowings under a USD 385 million loan facility provided by Bank of Scotland and BNP Paribas[46].

(iii) Lundin Norway AS was quickly awarded licenses to operate on the Norwegian Continental Shelf where it became a major player over the next decade. It saw a considerable growth of its business and developed into a highly successful company by virtue of its E&P activities. The success can largely be attributed to significant oil discoveries between 2003/2004 and 2010. The company discovered the Edvard Grieg field in the North Sea in 2007 which it developed as operator and was joint operator with Statoil (now Equinor) on the Johan Sverdrup field (which represents one of the biggest developments on the Norwegian Continental Shelf).

(iv) Aker BP had extensive knowledge of Lundin Energy Norway, is assets and operations. The companies were partners in several licences and had cooperate closely for many years.

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[44] Equivalent to the second step in the six-step process.
[45] https://www.dno.no/en/investors/announcements/lundin-transaction/
[46] https://www.rigzone.com/news/oil_gas/a/14024/lundin_completes_acquisition_of_dno_assets_in_norway/.

To assess whether the target company had any connection to the allegations of Lundin Energy's human rights impact in Sudan, we made the following observations:

(i) Lundin Energy Norway did not exist at the time Lundin Energy operated in Sudan but was incorporated at a later stage. The acquisition from DNO took place after the operations in Sudan had ended. The Norwegian E&P business had been owned by DNO during the time that Lundin Energy operated in Sudan.

(ii) Neither Lundin Energy Norway nor other target companies had, as a matter of fact, had any involvement with or connection to Lundin Energy's operations in Sudan or their alleged adverse impacts.

(iii) The investigations into potential human rights violations had been carried out over a period of several years before an indictment was issued. The Swedish prosecutor had not included Lundin Energy Norway AS or any of the other target companies in the criminal case, and there was no other criminal investigation against Lundin Energy Norway AS.

(iv) Over the years that NGO's had publicly accused Lundin Energy of contribution to adverse human rights impacts with a responsibility to compensate victims, no claims or allegations had ever been directed at Lundin Energy Norway AS (or other target companies). Similarly, no allegation had ever been made that Lundin Energy Norway AS carried any liability or responsibility to compensate victims.

We have noted the claim set forth in the Complaint that the alleged adverse impact is directly linked to Lundin Energy Norway AS, based on an assertion that Lundin Petroleum's acquisition of the Norwegian assets from DNO was fully financed through the profits from the sale of its Sudan operations. As set out above, this is not correct. In any event, even if parts of the sales proceeds from Sudan had been used to acquire the Norwegian assets in 2003, it would not mean that the Norwegian E&P business had a link to or responsibility for any human rights impacts of its parent company's past activities in Sudan.

We have now accounted for our risk assessment regarding the possibility of there being a connection between the target(s) and the human rights impact allegedly caused or contributed to by Lundin Energy. There was an overlap between the issues generally addressed in the due diligence and those covered by a human rights due diligence. We found no connection between the alleged adverse human rights impacts and the operations of Lundin Energy Norway or any other target company. This conclusion was referred to in the public communication when the transaction was announced and in meetings with the NGOs following the transactions.

13.6 Orrön Energy's future financial capacity

The human rights due diligence also addressed the financial solidity of Lundin Energy (Orrön Energy) after the transaction. The relevant issues overlapped with the risk assessment otherwise addressed in our due diligence. Orrön Energy's financial robustness was an issue we carefully considered, for several reasons. A central issue in a corporate due diligence is to identify and address any potential obstacles for the completion of the transaction. In this case, the transaction could not have been completed unless the corporate bodies of Lundin Energy were confident that the company would be able to meet future liabilities and obligations. Our focus was that Orrön Energy should have a solid financial basis for developing a successful business, which would enable the company to meet its future financial obligations. The main uncertainty concerned Orrön Energy's potential future financial obligations stemming from its Sudan operations. We noted that such obligations would not arise for at least 7-8 years if the litigation were to proceed through all court instances. Our focus was that Orrön Energy should remain a robust

company in the years to come. The relevant perspective for assessing Orrön Energy's future financial standing would be a financial analysis of the business and its prospects.

In the following we shall describe our due diligence with respect to the relevant issues:

Lundin Energy's distribution of dividend

It was clear that Lundin Energy's decision to distribute the merger consideration as dividend would significantly reduce the value. We made the following observations:

(i) Swedish law sets out strict legal requirements that must be fulfilled before a decision to distribute dividend, including an assessment and endorsement by the company's independent auditors. Board members as well as auditors are under legal liability for any negligence related to their assessments and decisions.

(ii) The decision to distribute dividend is solely a matter between Lundin Energy and its shareholders. A dividend decision must be adopted by Lundin Energy's shareholders at the General Meeting with a two thirds majority.

(iii) Lundin Energy's largest shareholders, apart from the Lundin family, consisted of large, well-known and reputable institutional investors with their own commitments to respect human rights.

(iv) Lundin Energy's Board of directors consists of independent, experienced, and highly qualified directors with deep insight into the claims regarding the company's alleged contribution to human rights violations in Sudan and the claim voiced by NGOs over the years that Lundin Energy has a financial responsibility to remedy victims of human rights violations in Sudan.

(v) We sought and obtained confirmation from the Board of Lundin Energy that the dividend proposal would be subject to a thorough process and that the Board were confident in their assessment that Orrön Energy would continue to be a financially robust company set up with a solid financial basis for further growth.

(vi) We sought and obtained confirmation from the Board of Lundin Energy that the company had consulted with external advisors and that their assessment had been confirmed by professional advice.

We concluded that the corporate bodies of Lundin Energy AB were well-informed and that all that all corporate decisions would have to meet strict the legal requirements. We had no reason to believe that corporate decisions would be negligent in any way.

Information about the victims' claim for compensation

(i) We were obviously aware of the claims for remedy raised by the victims. We observed that no formal claim had been raised against Lundin Energy, neither before the courts nor through any other procedure.

(ii) We had several meetings with Lundin Energy to understand the history of the claims, which claims had been notified and in what form, i.a. whether a specified and/or documented claim had been presented.

(iii) Specific information about the size of a remedy claim was limited. Our observation was that very few actual claims had been made against Lundin Energy despite the high-profile nature of the case and public statements by NGOs referring to such claims. There had been ample time to present claims. The unclear nature and scope of the claims was an element in understanding and assessing the scope of Lundin Energy's potential liability.

(iv) It was observed that Lundin Energy had always refuted any responsibility for contribution to human rights violations in Sudan and would defend themselves against these allegations in court. It was also observed that Lundin Energy did not consider there to be grounds for claims for compensation or other forms of responsibility on the part of the company.

(v) It was also observed that Lundin Energy's had company policy and public commitment to comply with the UNGPs and the OECD Guidelines and they confirmed their continued commitment to the Guidelines.

(vi) Lundin Energy's position is that they have not contributed to human rights violations in Sudan. It was clear to us that Lundin Energy would await a clarification of their potential liability and economic obligations through the criminal proceedings before considering addressing claims for compensation in any form.

The financial solidity of Orrön Energy following the transaction

Our assessment of financial solidity of Orrön following the transaction in relation to a potential future obligation to pay compensation to victims were based on the following observations:

(i) Orrön Energy qualified for and was to remain listed on Nasdaq Stockholm.

(ii) Orrön Energy had the backing of the Lundin Group of Companies, which has an outstanding history and a proven track record of building strong, entrepreneurial, and growth-oriented companies. The renewables business was already established and had shown its potential. We also noted that there would be continuity in the management of the company.

(iii) Orrön Energy would be well positioned to create value with cash generating assets and a strong financial capacity to fund further growth through acquisitions in line with its business strategy.

(iv) Whilst the company's financial situation at that future point in time was uncertain, the balance sheet was robust, and a significant improvement was to be expected in the following years.

Based on our analysis of its capitalisation, the nature of the renewables assets, its ongoing operations, and its business plans, our assessment was that Orrön Energy was likely to develop in accordance with its plans for growth over the next years, both short-term and longer-term.

It should be clear that fulfilment of the victims' claims for compensation from Orrön Energy required a resolution of the conflict between the complainants and Orrön Energy, either through a court process or a willingness on the part of the company to participate in a remediation process in line with the Guidelines. The point in time where Orrön Energy's financial capacity could potentially be relevant for the victims' possibility of obtaining remedy would arise long after the transaction, probably at least 7-8 years. This is significant for assessing whether there, at the time of the transaction, would be a "*foreseeable future failure*" of Orrön Energy to address remedy at the relevant time in the future.

It is still our view that Orrön Energy is likely to have the means necessary for remedy at a cost that would realistically be required if the company at a future point in time should be compelled to provide remedy in line with the expectations set out in the Guidelines. Our conclusion is supported by the facts we have set out above and, we might add, is also confirmed by Orrön Energy's subsequent development and current financial standing. We note that the major institutional investors share the view that Orrön Energy is well positioned to successfully grow its business and achieve long-term value creation for its shareholders. The investors are fully aware of the criminal proceedings and the forfeiture claim as well as the public claims that the company has a responsibility to compensate victims, and would have taken these factors into account in their financial analysis.

13.7 Stakeholder dialogue

We shall briefly touch on the issue of stakeholder engagement. It will be obvious from our account of inside information regulations as well as contractual confidentiality obligations that no such dialogue was possible prior to the transaction being publicly announced. After the transaction was announced, Aker BP and Aker ASA were contacted by NGO's (some of which are amongst the complainants) and two meetings were arranged in which Aker BP's CEO and other senior personnel met with several NGOs. As these meetings show, Aker BP and Aker ASA showed willingness to engage with stakeholders. In the meetings the NGO's shared their concerns about what they perceived as the transaction's adverse impact on the victims' right to remedy. This was acknowledged by Aker BP and Aker ASA, who also expressed their sympathy with the victims 'situation and respect for the work that is being done by the NGO's to support and promote the victims' interests.

It was stressed by Aker BP that issues related to human rights impact had been assessed in connection with the transaction and that neither Lundin Energy Norway nor the other companies to be acquired by Aker BP had ever had any connection to the alleged human rights impacts of Lundin Energy's operations in Sudan. We also expressed our disbelief in the assertion that Orrön Energy would not have capacity to meet its alleged obligation to remedy victims. The information provided by the NGOs in these meetings did not give rise to a change of our assessment. It also remained unclear why the NGO's had not directed their concern at Lundin Energy's shareholders, who were the parties with the closest connection to the impact and the most leverage over the relevant decisions.

13.8 The complainants' Submissions on Aker BP's human rights due diligence

The Submissions include a lengthy discussion related to Aker BP's human rights due diligence obligations, and the complainants' assumptions in this regard. Their review is entirely based on the premise that Aker BP contributed to the adverse impact on the right to remedy. The argument is that any human rights due diligence that did not conclude that Aker BP contributed to an adverse impact on the right to remedy, must be faulty per se. Since their perception of the relevant facts deviates considerably from ours, we shall not address their account in any detail. We will, however, comment on the complainants' fear that the Aker companies "*may have misunderstood the Guidelines and therefore incorrectly analysed that in situations of contribution they did not bear responsibility for contribution to the impact",* and their consequent submissions that a properly prepared human rights due diligence would have prevented such error.[47]

The claim that we "*mischaracterise that para 12 refers to a situation caused or contributed to by a business relationship"* is misguided. There is no error or misunderstanding on our part, and we have not confused the different human rights due diligence provisions of the Guidelines. We simply were not addressing a situation of alleged "contribution", as assumed by the complainants. The statement in our

[47] Submissions para 29 on page 16, cf. para 31.

Initial Response leading us to emphasise the fundamental principle that human rights due diligence does not shift responsibility read:

> *Enterprises are also expected to seek ways to prevent or mitigate (but not remedy) adverse human rights impacts that they are directly linked to by a business relationship, even if they do not contribute to those impacts.*[48]

The complainants have clearly misread the assertions set out in our Initial Response, probably because their approach to examining Aker BP's human rights due diligence is entirely based on their premise of contribution to adverse human rights impacts on the part of Aker BP.

On our part, we are not sure how to understand this statement by Professor Ramasastry:

> *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.* [49]

If Professor Ramasastry is suggesting that a direct linkage to the adverse impact carries a responsibility towards remedy, we respectfully disagree. The Guidelines' expectations of a company to remedy adverse impacts applies only in situations where the company has caused or contributed to such impacts.

There is no basis for a conclusion that Aker BP's human rights due diligence did not assess the relevant issues or that we should have identified a risk of contributing to a denial of remedy.

PART IV INVESTORS' RESPONSIBILITY UNDER THE GUIDELINES AND THE ALLEGATIONS AGAINST AKER ASA

14. Investors' responsibility under the Guidelines

The Complaint against Aker ASA concerns the relationship between an investor and investee company. The complainants refer to the following starting points for the Guidelines' approach to investors' responsibility:

- The relationship between an investor and investee company is generally considered a business relationship under the Guidelines.
- There can be a direct link between an investor and adverse impacts caused or contributed to by companies in their portfolio.
- Investors are expected to identify, prevent and mitigate actual and potential adverse impacts of investee companies.
- Investors should use their leverage to influence investee companies to prevent, mitigate or address adverse impacts.
- Investors should not endorse or cooperate in failure by investee companies to comply with the OECD Guidelines.

[48] Initial Response, para 4.
[49] Expert opinion of Professor Ramasastry, para 4.

We agree with these principles as the starting point for assessing an investor's compliance with the Guidelines and shall address Aker ASA's human rights due diligence in this context. First, we shall give an account for the investors in Aker BP and Lundin Energy respectively as they would have different links to the impact in question.

15. The investors in Aker BP

The largest shareholders in Aker BP at the time of the transaction and afterwards were:

At the time of the transaction:		*After completion of the transaction:*	
Aker Capital AS, Norway	37.14%	Aker Capital AS, Norway	21.16%
BP Exploration Op Co Ltd, UK	27.85%	BP Exploration Op Co Ltd, UK	15.87%
Folketrygdfondet, Norway	3.44%	Nemesia S.A.R.L, Switzerland	14.37%
		Folketrygdfondet, Norway	4.74%

No shareholder had sole or joint control in Aker BP, neither at the time of the transaction nor after. We note that no complaint was filed against any of the other shareholders/investors in Aker BP. The complaint against Aker ASA might be based on the misunderstanding that the negotiations with Lundin Energy were conducted by Aker ASA with no representatives of Aker BP present. As noted above, that is not correct.

16. The investors in Lundin Energy AB

The investors in Lundin Energy have at all relevant times comprised a high number of reputable institutional investors in addition to the Lundin family (who held around one third of the shares). The Norwegian pension funds NBIM and Folketrygdfondet have been long-time investors. Statoil (now Equinor), in which the Norwegian state is the controlling shareholder, owned 20% of Lundin from 2016 to 2020. Throughout the years, many of the major Swedish banks, pension funds and other institutional investors have been shareholders in Lundin Energy.

Swedish NGOs representing the victims' cause have approached large institutional investors over several years to address the allegations against Lundin Energy for contribution to human rights violations. In 2017, the Swedwatch (a complainant) and Fair Finance Guide published the report *Fuel for Conflict – Investors and the case of Lundin Petroleum in Sudan*[50], addressing the responsibility of Swedish banks and pension funds with shareholdings in Lundin Energy:

> *The report examines how Swedish banks and pension funds have responded to allegations that Lundin Petroleum contributed to the killing and displacement of thousands of people. The seven biggest banks in Sweden and the Swedish government pension funds own Lundin shares worth 3.6 billion SEK (over 410 million USD. […]*
>
> *These are the recommendations for the investors in Lundin Petroleum:*
>
> - *Conduct proper human rights due diligence regarding their investments in Lundin, focusing on the consequences of the operations in southern Sudan between 1997 and 2003. […]*
> - *Act on the findings of this process and address all adverse impacts on human rights that have arisen as a result of Lundin operations in Sudan between 1997 and 2003, then use their leverage to encourage Lundin to act in accordance with the UNGPs and address the impacts, be it through remediation or other means.*

[50] https://swedwatch.org/region/investors-fail-to-act-on-allegations-against-lundin-petroleum/

- *Demand transparency and cooperation from Lundin when assessing and addressing adverse human rights impacts connected to the company's operations in Sudan, through either investor due diligence or an independent investigation.*

Swedwatch subsequently reported that the investors had failed to act on these recommendations.[51] Yet the NGOs have not taken the opportunity to use the NCP mechanism to examine the investors' responsibility to conduct human rights due diligence and act on the findings. When the complainants decided to use the NCP mechanism to voice their grievances in connection with Lundin Energy's alleged responsibility towards victims of human rights impacts in Sudan, they directed their claim against the buyer of Lundin Energy Norway AS and the largest shareholder of the acquiring company. The Submissions refers to a comment by Aker BP's CEO to the effect that Lundin Energy's shareholders were closer to the alleged adverse impact than any of the Aker companies, which is obviously the case. It was the Lundin Energy shareholders that adopted the resolution to distribute of dividend and it was the Lundin Energy shareholders that received the funds. The shareholders gained, Aker BP did not. The rationale for a complaint against Aker ASA as investor in Aker BP is not clear to us, particularly in light of the choice not to address the alleged responsibility of Lundin Energy's investors, neither in the years up to 2021 nor in connection with the transaction.

17. The allegations against Aker ASA

It is not entirely clear what the claims against Aker ASA now are, as the Submissions use the term "Aker" referring to the two companies jointly. We assume that the complainants do not assert that Aker BP's and Aker ASA's responsibility is the same, and we also recall the comments on the different roles of the two companies in the Initial Assessment. The NCP emphasised that the main issue in the Specific Instance is the due diligence expectations with respect to Aker BP. We shall therefore keep our response to the claims against Aker ASA brief.

The allegations raised in the complaint against Aker ASA were similar to those raised against Aker BP for non-compliance with the Guidelines but have now been limited accordance with the Initial Assessment:

> *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 […].*[52]

In respect of the parts of the Complaint that are still relevant to this Specific Issue, we refer to our submissions set out above on behalf of Aker BP. As an investor, Aker ASA has a business relationship with Aker BP, but the transaction did not create a business relationship between Aker ASA and Lundin Energy. Aker ASA had no connection to the alleged adverse impact. The relevant focus for Aker ASA's human rights due diligence is that with regards to its portfolio company Aker BP. It may seem that the remaining claim against Aker ASA is that it should have identified and addressed the alleged inadequacy of Aker BP's human rights due diligence confirmed that of Aker BP. With the conclusion that Aker BP met the expectations set out in the Guidelines, there can be no failure on the part of Aker ASA related to Aker BP's human rights due diligence. We submit that Aker ASA has met the Guidelines' expectations of investors' human rights due diligence. We will refrain from further comments on the allegations against Aker ASA as an investor at this time but may of course provide more information should be deemed necessary by the NCP.

[51] Ibid.
[52] Submissions, para 24.

PART V CONCLUSIONS AND FINAL REMARKS

18. Conclusions

Based on the submissions set out above, we shall summarise our conclusions as follows:

(i) Aker BP and Aker ASA did to carry out human rights due diligence in connection with the transaction as part of the general due diligence process, in line with recommendations of the Guidelines as well as other OECD guiding documents.

(ii) Aker BP conducted human rights due diligence to identify whether there was any connection between the allegations of human rights impacts and the companies being acquired, in line with the recommendations set out in Professor Ramasastry's expert opinion.

(iii) Aker BP conducted human rights due diligence on the financial solidity of Orrön Energy, focussing on the importance of Orrön Energy remaining a robust company with a financial platform for further growth.

(iv) The complainants rely on inaccurate facts and unfounded assumptions to support their claims and allegations. They mischaracterise the transaction as a merger between Aker BP and Lundin Energy, they give a completely distorted description of Orrön Energy, and they speculate about processes into which they have no insight.

(v) The complainants' description of the facts relevant to assess the cost of remedy as well as Orrön Energy's financial standing and likely future development, fall short of any analysis. A proper review of the relevant facts does not support the claim that the cost of remedy would greatly exceed the funds expected to be available to Orrön Energy at the relevant future point in time.

(vi) The right to an effective remedy, as protected under international human law, does not extend to the protection for which it is invoked by the complainants.

(vii) An examination of the human rights due diligence that was carried out will show that our findings and conclusions are supported by the facts. Aker BP and Aker ASA correctly did not identify an adverse human rights impact in respect of the right to remedy.

19. Further strengthening of the companies' guidelines and procedures.

Both Aker BP and Aker ASA have solid policies, guidelines and procedures related to responsible business conduct issues ("RBC issues"), including a commitment to respect human rights and carry out human rights due diligence. In the two years that have passed since the transaction both Aker BP and Aker ASA have continued to develop their internal guidelines and procedures. The companies continually strive to improve, and the review of our procedures is an ongoing exercise. In connection with the Transparency Act that entered into force on 1 July 2022, there was a particular focus on further aligning our policies, guidelines, and procedures regarding human rights due diligence with the Guidelines. We take the opportunity to highlight some of the developments:

Both Aker ASA and Aker BP have implemented a new Integrity procedure for M&A transactions focussing on RBC issues, including human rights due diligence. It incorporates the human rights due diligence

process, with reference to the Guidelines and the Guidance. The purpose of the procedure is to ensure that RBC issues are always handled in a systematic, proportionate, and relevant manner in connection with mergers and acquisitions. The procedure specifies how RBC issues shall be addressed within the broader processes for risk assessment related to M&A transactions:

- Perform a high-level assessment of the target of the transaction and the transaction itself to assess relevant RBC Issues.
- Develop a risk-based strategy to address relevant RBC Issues in the M&A transaction, including a Human Rights Due Diligence.
- Define how RBC Issues and the target company's adherence to the principles set out in the OECD Guidelines may be addressed in the M&A Due Diligence process in an appropriate manner.
- Produce a list of relevant topics that can be considered in M&A Human Rights Due Diligence.
- Consider and evaluate identified RBC Issues related to the target of the transaction and the transaction itself in the investment decision.
- Adequately address RBC Issues in transaction documents, to the extent relevant. (Examples: representations and warranties, indemnities, closing conditions, audit rights, termination rights, etc.)
- Determine a risk-based plan to address identified RBC issues and shortcomings in the target company's adherence to the principles set out in the Guidelines.
- Consider and decide if there should be a risk-based post-closing review within a reasonable timeframe (normally within the first 6 months, maximum within the first year) after the transaction to address RBC Issues and shortcomings in the target company's adherence to the principles set out in the Guidelines identified in the M&A due diligence process.
- As part of the work to strengthen the internal competence, both Aker ASA and Aker BP have rolled out a human rights training to employees and educated dedicated functions through SA8000 certification course and webinars, in addition to knowledge sharing across Aker group through informal collaboration networks. Aker BP has also implemented a program for training and awareness on human rights topics in the organisation.

20. Final remarks

We would like to offer some final observations regarding the NCP's consideration of this matter. The NCP shall examine allegations of non-compliance with the Guidelines on the part of Aker BP and Aker ASA. As noted in the Initial Assessment, this would require clarification of the Guidelines' recommendations regarding human rights due diligence in a context that has not previously been addressed in any detail. Professor Ramasastry's expert opinion provides an in-depth discussions and analysis based on an extensive review of relevant guidance and existing practice relating to business and human rights, published by various institutions from 2011 and forward. She has also included extensive references to guidelines and procedures developed by other companies and relies upon examples of company practice when discussing the human rights due diligence expectations of the Guidelines.

We have shown that Aker BP did carry out human rights due diligence in accordance with the main observations expressed by Professor Ramasastry but would nevertheless make a general comment regarding her expert opinion in the context of the Specific Instance. An interpretation of the Guidelines based on a comprehensive review and analysis of numerous publications as well as company practices, is obviously very useful in developing guidance to companies and recommendations for best practices. We believe, however, that an examination of the threshold for a company's compliance with the Guidelines in a past situation cannot be grounded on standards for best practice or an analysis that require in-depth review of an extensive source material. We therefore invite the NCP to distinguish between the two in their considerations on these matters.

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