Before the Norwegian NCP Complaint against Aker BP

Response to Response and Submissions of Aker BP AS and Aker ASA on the Issues of Human Rights Due Diligence and Access to Remedy in the Context of Mergers and Acquisitions

Professor Anita Ramasastry

1. I have reviewed (i) the response by Aker BP ASA and Aker ASA (collectively "Respondents") to the submission by Complainants in the instance before the Norwegian National Contact Point and (ii) the further response by complainants to Respondents. I provide my response below.

Reference to Guidance

2. The Respondents claim that references to good practice or interpretative guidance from the OECD, the Office of the High Commissioner for Human Rights (OHCHR), and other sources is only relevant to the case to inform guidance for future best practices. The Respondents note 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 an in-depth review of an extensive source material."[1]
3. The relevance of the guidance, which was cited, primarily from the OECD and OHCHR relates to how a company's own commitment to the UN Guiding Principles (UNGPs) should be assessed.
4. The question of the adequacy of Aker's human rights due diligence should be considered in light of key guidance which clearly establishes that mergers and acquisitions are not exempt from the requirements of due diligence. The guidance which is cited is illustrative to clarify basic expectations for a company's human rights due diligence, including stakeholder consultation, use of leverage, and undertaking the human rights commitments of partners in business relationships.
5. I would respectfully note that the NCP should indeed consider the guidance relevant. Furthermore, the guidance is not obscure or hard to locate.

Scope of human rights due diligence in the context of this merger

6. The Respondents have made several arguments in relation to Aker's obligation to conduct human rights due diligence.
7. The first is that the scope of human rights due diligence during a merger and acquisition is solely on the target but not on the larger transaction and how it was structured as a first step in its human rights due diligence inquiry. To characterize the due diligence

[1] Aker, *Response*, p 36.

obligation so narrowly would allow companies to merge and to divest of holdings with human rights liabilities, as a possible means of avoiding provision of effective remedy.

8. This narrow framing of the issue, does not take into account the context from which this case arises. The response also treats mergers and acquisitions and obligations in the legal context as the same as obligations with respect to a company's commitment to respect human rights and to implement the UNGPs. They are not the same.
9. The respondents themselves state that "The [OECD] 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 concrete circumstances".[2] Similarly, when outlining their approach, they note that since due diligence is not a tick box exercise "additional practical actions or implementation measures not described the Guidance may be useful in some situations."[3]
10. I agree with this point. The context of a particular human rights claim is highly relevant to the nature of human rights due diligence called for. Existing guidance on the UNGPs and mergers makes the point that human rights due diligence is applicable to mergers and acquisitions broadly. From there, context becomes relevant.
11. The larger question in this case is what should be the scope of human rights due diligence by a company engaged in a merger and acquisition negotiation with a company whose prior chair and chief executive are under criminal indictment for serious international crimes arising from their company's business operations?
12. In addition, the question should also be about what should the nature of such human nights due diligence be when the merger led to 98% of the company's assets being merged with only 2% remaining in the separate company, now known as Orrön Energy. This second question should be read together with the first. These two key factors make this merger distinct from garden variety mergers
13. In this context, Aker should, as part of its negotiations with Lundin Energy AB ("Lundin"), have assured that the merger, and the proposed structure would not be used by Lundin to avoid its responsibility to rights holders, and to provide remedy. Thus, the NCP in addressing the nature of human rights due diligence should not look solely at human rights due diligence as it relates to Lundin Energy Merger AB. The human rights policies and practices of the parent company Lundin, as the architect of the transaction is also relevant.
14. Aker, through its negotiations with Lundin as the parent company had a business relationship at the time of the negotiations. Part of its human rights due diligence should have been to determine how structuring the transaction with the creation of a Merger co, would be impacting on the issue of access to remedy for victims of war crimes and human rights abuses in Sudan. This was an opportunity to exercise leverage to structure a transaction that potentially led either to provision of a remedy consistent with the expectations of the UNGPs and OECD Guidelines or in the event of civil or criminal claims being successful -or in a lack of remedy for victims.

[2] Aker, *Response*, p.23.
[3] Aker, *Response*, p. 24.

15. In general, much of business and human rights guidance focusing on business relationships, asks companies to address the human rights records of their business partners and to do so when deciding whether to enter into a relationship with them.[4] At this stage, the Lundin criminal indictment should have triggered human rights due diligence in terms of Lundin as a business partner and the nature of Lundin's corporate culture and human rights due diligence processes at the management level.
16. Given that this was the context, the larger issue is what sort of human rights due diligence was conducted by Aker when it was merging and acquiring the vast majority of Lundin's assets, and spinning off assets connected directly to the war crimes in the spun off company? What sort of human rights due diligence was done on the transaction as a whole, to ensure that the transaction was not structured to avoid providing remedy to claimants/rights holders?
17. As claimants note "[h]uman rights due diligence in the context of mergers and acquisitions should include HRDD on the transaction". Claimants note :

> *"Although Aker expend much energy in their Response to seek to focus the HRDD towards companies targeted (i.e. to be purchased), even their own policies and practices now show that they agree that the scope should be wider.*
> *This is evident in their own policies, put in place since the events of this complaint. Aker explain that its new integrity procedure for M&A transactions includes "a high-level assessment of the target of the transaction and the transaction itself to assess relevant RBC issues" and will "consider and evaluate identified RBC issues related to the target of the transaction and the transaction itself in the investment decision" (emphasis added). The requirement that the effect of the transaction was a matter for HRDD is beyond debate, not least because "a business enterprise's human rights risks are any risks that its operations may lead to one or more adverse human rights impacts."*
>
> *Aker's decision to merge/acquire Lundin was an operation (in which they almost doubled their size) that may have led to the adverse human rights risks warned of. They needed to assess such risks."*

18. The respondents in outlining their approach to due diligence note that the "OECD Guidelines for MNEs provide enterprises with the flexibility to adapt the characteristics, specific measures and processes of due diligence in their own circumstances." Thus, they acknowledge that circumstances matter, and the unusual ones of this merger are relevant to the adequacy of Aker's human rights due diligence.

[4] Human rights due diligence should be initiated as early as possible in the development of a new relationship because human rights risks can be increased or mitigated at the stage of structuring contracts and may be inherited through mergers and acquisitions. Global Business Initiative, Managing Business Relationships https://gbihr.org/business-practice-portal/business-relationships (visited 20 March 2024).

Temporal Nature of Merger

19. Respondents also note that there is no way in which Aker's linkage to Lundin could amount to contributing, not only because of the arguments above, but because merger relationships are short lived. The implication is that the OECD's Guidance's statement that a relationship may change from directly linked to contributing "for example as situations evolve" does not apply to short-lived relationships.
20. By differentiating investor-investee relationships from supply chains, the respondents also indicate that "the business relationship between the seller and a buyer in a merger or acquisitions situation is short lived." (p. 23) The same point is made again when the respondents cite an article by Anna Triponel and state that "the tight timing of the deal and confidentiality make it particularly challenging to fully assess human rights risks."
21. To the contrary, the entire premise of Triponel's article is that considering human rights risks entails taking an approach which is fundamentally different to how lawyers are traditionally trained. So while there are challenges, the author explains the need for lawyers to take a different approach to human rights risks to people.
22. Moreover, if the transaction were structured in a way that denies parties access to remedy or somehow creates challenges, then the fact that one party failed to conduct due diligence or adequate human rights due diligence could entail contribution (as discussed below).
23. The OECD Guidelines and the UNGPs do not leave due diligence decisions solely to the company. Stakeholders are meant to be engaged to identify what issues may be salient and where steps need to be taken.[5]
24. As Complainants note "[*t]he original Complaints were filed before the merger came into effect on 30 June 2022, at a time when Aker had a business relationship with Lundin Energy and could and should have taken measures to address the adverse impacts it could and should have identified (namely: the perpetuation of the denial of remedy).*" [6]
25. The timing of a transaction is also not grounds under the UNGPs or the OECD Guidelines to absolve a company from its human rights due diligence obligations. In general corporate lawyers would also not cut corners on general risk assessments and due diligence given the significant risks and stakes involved in larger scale corporate acquisitions.

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[5] The *OECD Due Diligence Guidance* notes that meaningful stakeholder engagement is a key component of the due diligence process. Furthermore:

> Responsive engagement means that the enterprise seeks to inform its decision by eliciting the views of those likely to be affected by the decision. It is important to engage potentially impacted stakeholders and rightsholders prior to taking any decisions that may impact them. This involves the timely provision of all information needed by the potentially impacted stakeholders and rightsholders to be able to make an informed decision as to how the decision of the enterprise could affect their interests. It also means there is follow-through on implementation of agreed commitments, ensuring that adverse impacts to impacted and potentially impacted stakeholders and rightsholders are addressed including through provision of remedies when enterprises have caused or contributed to the impact(s).
> *OECD Due Diligence Guidance*, pp. 49-50.

[6] Complainants' Response, par.16.

26. In this case, there was already an awareness of a potential significant human rights impact arising from the underlying criminal prosecutions which were well-known, and with the potential to be exacerbated by the structure of the merger.

Adequacy of Human Rights Due Diligence

27. The nature and adequacy of Aker's human rights due diligence during the initial negotiations for the merger as the companies discussed the statutory merger and transfer of assets remains a key issue
28. Much of Aker's response focuses on the fact that Lundin Energy Norway had no connection to the issues of war crimes and human rights abuses in Sudan. As noted above, this is not the only relevant inquiry.
29. There should have been a focus on the Lundin management's own human rights processes and commitments, as well as to the structure of the transaction and its impact on human rights. This is particularly the case given the red flags identified by Complainants, as well as in the NCP complaint filed before the merger was conceded.
30. At the initial stage of negotiations, questions of the parent company's own human rights policies and processes became relevant, as well as the nature of the transaction as a whole and whether it's designed structure to divest of only a fraction of the company's assets (those connected with the criminal case) was rights respecting.
31. To knowingly limit due diligence solely to assets that Aker knew were unconnected to Lundin's Sudan operations, would allow companies to limit and design their due diligence processes as a way of foreclosing the need to address human rights impacts. Surely this is not the case.
32. As the Complainants' response sets out, there are various factors which indicate that human rights due diligence that conforms to the UNGPs and the OECD Guidelines did not occur. Aker deferred to Lundin's assertions regarding the company's responsibility with respect to international crimes. They also focused on whether Orrön was capitalized in a way that was positive, without consulting experts to address the cost of civil claims in light of the criminal proceeding. The Complainants note:

    The Response shows that Aker agrees that they should have assessed Orrön's ability to provide remedy. Nevertheless, we set out below that Aker materially failed to do so as they:

    a. *materially bypassed clear red flags in their due diligence;*

    b. *weighted Lundin's defence but not properly assess the full circumstances, which included that the criminal indictment filed after long investigation suggest a high risk that Lundin had indeed contributed to adverse impacts;*

    c. *did not properly assess the financial capacity of Orrön;*

    d. *did not properly assess the costs of remediation; and*

e. did not conduct stakeholder engagement that may have corrected these flaws.[7]

33. Finally, there is the question whether Aker contributed to denial of remedy for the Sudan victims by virtue of its failure to conduct adequate human rights due diligence. In my original opinion, I note that a company's actions can shift from direct linkage to contribution. I also believe this is not foreclosed by the timing of a merger, especially when there are clear cut indicators as to why human rights due diligence is critical to a transaction.
34. Respondents state that the OECD Due Diligence Guidance which notes that a failure to conduct proper human rights due diligence can turn direct linkage into contribution that this "is clearly a reference to a long term business relationship".
35. The concept that there is a continuum between linkage and contribution is one that has also been emphasized not only by the OECD but also by the OHCHR[8]. Nothing in the OECD or OHCHR Guidance states that situations of linkage can evolve only in long term relationships. This is not an accurate inference.
36. Claimants have now provided an analysis that Aker's conduct in the face of significant facts during the merger, contributed to a denial of remedy by agreeing to the current structure without adequate due diligence in relation to the entire transaction. They outline the relevant factors and red flags in paragraphs 74-75 of their Response. In sum, they note "[w]hen the merger was well underway and while Aker and Lundin were in confidential negotiations, this OECD Complaint was filed. A full warning was provided. There was a chance for a course-correction to safeguard against the risk that Aker and Lundin's deal could stymie the victim's remedy."
37. Given these factors, it is possible that Aker's conduct constituted contribution. The significance of the need for adequate human rights due diligence, which grappled with the issue of Lundin's failure to acknowledge the need for remedy, and the ongoing criminal proceedings, created a situation where proper due diligence (not limited to Lundin Norway's assets), was essential to Respondents commitments as adherent to the UNGPs and OECD Guidelines.
38. The *OECD Due Diligence Guidance* attempts to clarify what it means for a business to contribute to an adverse impact:

    Contribute: An enterprise "contributes to" an impact if its activities, in combination with the activities of other entities cause the impact, or if the activities of the enterprise cause, facilitate or incentivize another entity to cause an adverse impact. Contribution must be substantial, meaning that it does not include minor or trivial contributions.

    The substantial nature of the contribution and understanding when the actions of the enterprise may have caused, facilitated or incentivized another entity to cause an

[7] Complainants' Response par. 31.

[8] OHCHR Response to Request from Bank Track for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector 12 June 2017 at p. 6. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf

adverse impact may involve the consideration of multiple factors. The following factors can be taken into account:

- *the extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring.*
- *the extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability.*
- *the degree to which any of enterprise's activities actually mitigated the adverse impact or decreased the risk of the adverse impact.*[9]

39. Based on the factors outlined above, it seems that a failure to exercise leverage to properly ensure access to remedy for claim increased the risk of this happening. As for the issue of foreseeability, the risk was known to Respondents and their actions did not mitigate or decrease the risk of the impact.
40. As OHCHR has also noted, contribution can arise when a company omits to take action. In their guidance relating to banks OHCHR indicates:

    However, a bank may facilitate a client or other entity to cause harm if it knows or should have known that there are human rights risks associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks. The bank's failure to act upon information that was or should have been available to it may create a facilitating environment for a client to more easily take actions that result in abuses. Conversely, if the bank knows about a human rights risk associated with a particular project and takes reasonable steps to prevent and mitigate these risks, the situation would instead in principle be one of 'linkage'.[10]

41. In conclusion I believe there are significant questions raised as to the adequacy of the Respondents' human rights due diligence during the merger transaction that warrant careful examination by the NCP.

    Signed

    Anita Ramasastry

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[9] OECD Due Diligence Guidance For Responsible Business Conduct, p. 70.

[10] OHCHR Response to Request from Bank Track for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector 12 June 2017 at p. 8.