

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)

REPLY FROM AKER BP ASA AND AKER ASA

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

We refer to the documents filed by the complainants on 22 March 2024 following our *Response and Submissions* dated 22 January 2024: "Notes on Final Written Submissions" (*the Notes*); "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 by Professor Ramasastry" (*Professor Ramasastry Response*) and "the Expert response by Dr Tara Van Ho" (*Dr. van Ho Response*). We also refer to the communication with the NCP regarding clarification of the initial assessment, with our letter dated 8 April 2024 and the NCP's response in an e-mail on 20 June 2024. We hereby submit the companies' reply (the Reply), accompanied by a further expert opinion by Professor Emberland with his comments to Dr. van Ho Response (Professor Emberland Response).¹

We start by reiterating the companies' submissions and position set out in our Response and Submissions dated 22 January 2024. In its Part III, we provided a detailed account of the Aker companies' due diligence in connection with the transaction. In Part II, we had commented and clarified the factual presumptions underpinning the allegations, i.e. the facts that the due diligence allegedly had failed to identify. All of our previous submissions stand. This Reply will supplement the Response and Submissions and respond to the complainants' criticism of the due diligence and some of the accompanying remarks. We shall also discuss the parties' diverging perceptions of the human rights impact under scrutiny (the right to an effective remedy as a human right in itself), which have become clearer with Dr. van Ho's Response.

1. Summary

The main points and conclusions set forth in this Reply, are:

- The right to an effective remedy, as a human right in itself, is not impacted in this case. This is the expert opinion of Professor Emberland, that has not changed after careful consideration of Dr. van Ho's Response.
- The framework for the Guidelines' recommendations to businesses is the "internationally recognised human rights" that are protected under international human rights law. There is no basis for an assumption that businesses' responsibility to respect human rights refers a wider protection of an individual's human rights than that which follows from international human rights law. Specifically, the human right to an effective remedy does not protect an individual's expectation for remediation for adverse impact on other human rights. That is solely a matter to be considered under the Guidelines.

¹ Other abbreviations in this Reply are the same as in our Response and Submissions. The company Lundin Energy AB, now Orrön Energy AB, will be referred to as Lundin and Orrön respectively and at times as Lundin/Orrön. We refer to Aker BP ASA ("Aker BP") and Aker ASA separately but we also use the term "the Aker companies" the same meaning as in the Notes (and Submissions).

- Aker BP's due diligence regarding potential human rights impacts properly addressed the relevant issues but reached a different conclusion than that of the complainants. Aker BP's assessment was that (i) there was no connection between the companies to be acquired and the potential liability arising from Lundin's former Sudan operations, and (ii) Orrön would remain a robust company with substantial assets and a solid business with a significant growth potential. There is no basis for an assumption that Orrön will lack the means required to address a potential responsibility for remediation in line with the recommendations of the Guidelines. Our assessment differs from that of the complainants with respect to Orrön's future financial capacity as well as the costs that would realistically be required for a Guidelines compliant compensation.
- Aker ASA's due diligence in connection with Aker BP's acquisition fully met the Guidelines' expectations to investors/shareholders.
- Both Aker BP and Aker ASA complied with the Guidelines' expectations regarding due diligence.

2. The right to an effective remedy

2.1 The human rights issue in the specific instance

The Complaints concerned grave human rights violations in Sudan during 1999-2003, perpetuated by the Sudanese army and militia groups during a civil war. Lundin Energy AB (*Lundin*), now *Orrön Energy AB* is accused of having contributed to these human rights violations. Only parts of the Complaints were accepted by the NCP for further examination. The specific instance shall examine the companies' due diligence in connection with the transaction with respect to a potential adverse impact on the right to an effective remedy, and not the underlying violations of human rights. The parties and the experts have different understandings of what the human right to an effective remedy, protected under the International Covenant on Civil and Political Rights (ICCPR) Article 2(3) and other human rights treaties, entail. This has therefore become an issue of contention that the NCP must clarify before examining the companies' due diligence in connection with the transaction.

It is understandable if the victims perceive the preoccupation with demarcating the scope of the human right to an effective remedy as formalistic and insensitive to the victims' cause. But this merely reflects the fact that the NCP's delimitation separated the issues for this specific instance from their conflict with Lundin.

The discussion of relevant issues has been convoluted by the fact that the term "remedy" takes on three separate meanings in relation to this specific instance. Firstly, as in the human right to an effective remedy; secondly, as in the Guidelines' expectations that businesses engage in remediation of adverse human rights impacts that they have caused or contributed to; and thirdly, as in legal remedies such as a tort law claim for damages. When considering the issues in the specific instance, these notions of remedy must be clearly distinguished, yet complainants as well as Dr. van Ho conflate all three. For example, they refer to victims' "right to remedy" under the Guidelines. Furthermore, Dr. van Ho opines that this right is integral to the human right to an effective remedy in the context of a business' responsibility to respect human rights. The Notes refers to the notion of "Guidelines complaint compensation", in terms of a tort law-based claim for damages. Complainants systematically muddle these distinct concepts of remedy to reach a conclusion that the victims' right to an effective remedy was adversely impacted through the transaction. We shall show how this confusion leads the analysis astray.

2.2 Diverging views on the right to an effective remedy as a human right

The alleged adverse impact in the specific instance is described by complainants as the foreseeable future inability of Orrön to address liability or responsibility towards remediation. The human right to an effective remedy is adversely impacted, it is asserted, because:

*the victims and those considering extensive civil or OECD Guidelines compliant compensation claims against Orrön must now confront that the company may be unable to pay. Litigation has become less viable. Compensation funds are depleted. As feared, remedy slips away.*²

The NCP noted that the right to an effective remedy is a human right in itself³ and delimited the issue in the specific instance to that of the companies due diligence in respect of the right to an effective remedy, whereafter:

- Complainants submitted an expert opinion by Dr. Tara van Ho, providing an academic analysis of the protection of a right to an effective remedy under the international human rights treaties, focussing on ICCPR Article 2(3).
- The Aker companies submitted Professor Marius Emberland's expert opinion on the same issues, also focussing on the interpretation of ICCPR Article 2(3). In the expert opinion of Professor Emberland, the right to an effective remedy, as protected under international human rights law, is not impacted in this case. Consequently, an adverse human rights impact, as addressed in the Guidelines Ch. IV, has not been identified.
- Complainants then submitted a Response by Dr. van Ho, dismissing Professor Emberland's expert opinion on the basis that *"he errs in his application of this expertise to the OECD Guidelines and the specifics of Business and Human Rights"*⁴. In her opinion, the right to an effective remedy takes on a different meaning when viewed in the context of the functional relationship between a business and the human rights impact. There is one factual error in her analysis; she incorrectly states that "a claim is pending".
- Complainants suggested that the NCP to "cut through Professor Emberland's academic analysis by focusing on the intended effect of the Guidelines as a practical working instrument to assist companies and communities to enable appropriate remedy in cases where there has been a breach of human rights".⁵
- The companies now submit Professor Emberland's response to that of Dr. van Ho, where he first points out that Dr. van Ho and the complainants base their response on a fundamental misreading of his expert opinion. He then explains why, in his opinion, the analysis provided by Dr. van Ho's Response does not lead to a correct conclusion.

As stated in the expert opinion of Professor Emberland, the right to an effective remedy as a human right does not extend to a protection of funds to meet a potential claim for compensation by those considering extensive civil or OECD Guidelines compliant compensation claims against Orrön. Hence, the human right in question has not been impacted.

² Notes, para 9.

³ With reference to the UN Declaration of Human Rights Article 8, the International Covenant on Civil and Political Rights Article 2(3) and the European Convention on Human Rights Article 13.

⁴ Dr. van Ho Response, para 2.

⁵ Notes, para 20.

2.3 Businesses' impact on the right to an effective remedy

There is no disagreement that the right to remedy is wholly capable of being impacted by businesses for the purpose of the Guidelines. Indeed, Dr. van Ho's expert opinion provides pertinent examples of how a business can impact the right to an effective remedy - such as when a company pays a bribe to a judge⁶. But as she proceeds to analyse a wider notion potential impact by businesses, she extends the protection of a right to an effective remedy to include a "right to remedy" in line with the Guidelines' concept of remediation. In her opinion, the individual's right to an effective remedy must be interpreted in the context of the functional relationship between businesses and human rights. Her analysis is illustrated through the construction of two hypothetical situations:

Imagine that Company A hires Company B to function as private security and takes adequate precautions to ensure Company B meets its human rights responsibilities. Despite Company A's efforts, Company B's employees rape and kill three women. [...] The primary rights are those of life and freedom from torture and cruel, inhuman, or degrading treatment or punishment. Company A is upset that its name will be associated with Company B's actions, so it lobbies legislators to have the statute of limitations for this case alone changed to 4 months while the negotiations are already in month 5. Has Company A breached its human rights responsibilities?⁷

We agree (and so does Professor Emberland) that this is a situation of adverse impacts on the right to an effective remedy. To lobby legislators to have the statute of limitations reduced, is an interference with the human right protected under ICCPR Article 2(3).

Then the parameters are changed:

Now, imagine instead that Company A is the parent company who, in a panic, negotiates the sale of Company B within a week of Company B's breaches. Company B is wound up in accordance with the state's laws so that there are no longer any assets in Company B while victims are still preparing their case. Would Company A be responsible under the OECD Guidelines for contributing to the denial of remedies? [...] I would argue unquestionably yes. An act aimed at avoiding the payment of reparations when the company is aware that victims are or will be seeking those reparations is to contribute to the denial of those remedies.⁸

Company A (the parent company who sells in panic) may be responsible under the OECD Guidelines but this is not a situation of adverse impact on *the right to an effective remedy* (as a human right in itself). In any event, the constructed example does not reproduce the situation in the specific instance but reflects the opposite relationship between the parent company/subsidiary and their respective involvement with breaches of the primary rights.

2.4 Remediation under the Guidelines

Dr. van Ho places the Guidelines' expectations of remediation at the heart of the analysis of the human right to an effective remedy, and complainants assume that remediation under the Guidelines must include compensation similar to a tort law-based claim for damages. Complainants' criticism against the companies due diligence is that it failed to properly assess the magnitude of Lundin's responsibility for remediation under the Guidelines. However, these allegations are not rooted in the Guidelines' provisions

⁶ Dr. Van Ho Expert Opinion, para 37.

⁷ Dr. van Ho Response, para 22.

⁸ Dr. van Ho Response, para 34.

on businesses' responsibility for remediation. Chapter IV, para 6 of the Guidelines, recommends that companies “[p]rovide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts”. The Commentary elaborates:

When enterprises identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact, the Guidelines recommend that enterprises have processes in place to enable remediation. Some situations require cooperation with judicial or State-based non-judicial mechanisms.⁹

The Due Diligence Guidance clarifies what is meant by “legitimate remediation mechanisms”, which can include State-based or non-State-based process through which grievances concerning enterprise-related adverse impacts can be raised and remedy can be sought, for example:

- *Legal processes such as prosecution, litigation and arbitration*
- *Non-judicial state-based mechanisms such as specialist government bodies [...]*
- *The National Contact Points to the OECD Guidelines for MNEs*

Notably, the Guidelines do not make any recommendations regarding the substance of a remedy but refer only to mechanisms and processes for addressing remedy for adverse impacts. The Due Diligence Guidance addresses remediation¹⁰ with primary focus on grievance mechanisms and process but also touches on the types of remedies that could be relevant outcomes of such processes:

The type of remedy or combination of remedies [...] may include apologies, restitution or rehabilitation (e.g., reinstatement of dismissed workers, recognition of the trade union for the purpose of collective bargaining), financial or non-financial compensation (for example, establishing compensation funds for victims, or for future outreach and educational programmes), punitive sanctions (for example, the dismissals of staff responsible for wrongdoing), taking measures to prevent future adverse impacts.¹¹

Nowhere is it suggested that reparation based on a tort law-based claim for damages is the required form of remedy under the Guidelines, especially outside of a judicial process. On the contrary, the Guidance explicitly refer to judicial mechanisms as appropriate in situations where there are disagreements on whether the enterprise caused or contributed to adverse impacts, or on the nature and extent of remediation to be provided¹². And the Guidelines explicitly states that they do not refer to legal concepts of liability:

The OECD Guidelines for MNEs are not meant to establish legal concepts around liability, including among enterprises. Domestic courts will use their own concepts and tests in considering accountability for harm and appropriate remedy.

There is no basis in the Guidelines for the assertion that “Guidelines compliant compensation” would require a payment (in any form) based on damages as the complainants assume.

3. The issue of alleged contribution and responsibility for remedy

The Complaints were based on an allegation that both Aker BP and Aker ASA had contributed to an adverse impact and therefore was responsible for remediation for the human rights harm in Sudan 20 years ago.

⁹ Guidelines, Ch. IV, para 46.

¹⁰ In connection with the sixth step of the due diligence process.

¹¹ Due diligence Guidance, page 34.

¹² Due diligence Guidance, page 35.

Only parts of the Complaints were accepted for further consideration, and the specific instance was delimited to the issue of companies' due diligence in connection with the transaction. It is important to note both that (i) due diligence does not shift responsibility from the entity causing the adverse impacts to the company with which it has a business relationship, and (ii) that in any event, the provision of a remedy is not a component of due diligence:

*The provision of a remedy is not a component of due diligence but a separate, critical process that due diligence should enable and support.*¹³

However, complainants have now requested that “the NCP also assesses the way Aker BP, through its own actions, is involved with this impact as to determine its current responsibilities vis-a-vis these rightsholders”.¹⁴ Complainants are asking the NCP to consider allegations that the Aker companies are contributing to (actual) adverse human rights impacts and therefore have a responsibility to remediate the victims of human rights violations in Sudan 20 years ago. We assume that the NCP will not consider other issues than those admitted for examination.

Nevertheless, we shall make some observations and general comments regarding the various arguments related to Aker BP's alleged contribution and subsequent responsibility for remedy. Firstly, it is quite clear that the complainants are pursuing a resolution to their long-standing conflict with Lundin, seeking to have Aker BP step into the shoes of Lundin/Orrön and engage in remediation in Lundin's place, including paying compensation for damages. Several lines of arguments are presented to support such outcome. One is that any responsibility of Lundin towards remediation of alleged contribution to adverse human rights in Sudan, has been absorbed or inherited by Aker BP based on “the essential unity of the corporation”, a concept that we shall comment on below. Another, explored by Dr. van Ho, is that Aker BP, through its own actions, contributed to a denial of remedy and therefore contributed to an adverse impact on the right to an effective remedy and therefore has a responsibility to provide remedy. Whatever the basis, the underlying allegations concern Lundin's potential primary responsibility for adverse human rights impacts in Sudan. In effect, complainants are asking the NCP to consider (or simply assume) that Lundin/Orrön has a responsibility to remedy victims, despite the express delimitation against this issue:

*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*¹⁵.

It should also be noted that the criticism of the due diligence merely assumes that Aker BP had contributed or would be contributing to an adverse human rights impact. The due diligence was inadequate and failed to meet with the Guidelines' expectations, they argue, because it did not identify such contribution. In other words, the allegation goes: Because Aker BP contributed to adverse impact, the due diligence was inadequate (as it failed to identify such contribution). Then the argument is turned around: Because the due diligence was inadequate, Aker BP has contributed to an adverse impact:

*Aker's due diligence can therefore not be considered acceptable human rights due diligence under the Guidelines, and consequently, the two Aker companies contributed to the adverse impacts on the right to remedy.*¹⁶

¹³ Due Diligence Guidance, Annex Q 48.

¹⁴ Notes, para 11, final bullet point.

¹⁵ Initial assessment, para 6.

¹⁶ Notes, para 87.

In the initial assessment, the NCP emphasised one of the most fundamental principles behind the Guidelines' expectations that a company carries out due diligence to identify adverse impacts:

[...] a merger or acquisition of a company or a group of companies may, depending on the concrete circumstances, be linked to an adverse impact on the right to an effective remedy. [...] However, due diligence does not shift responsibility from the entity causing the adverse impacts to the company with which it has a business relationship, cf. Chapter II of the Guidelines.¹⁷

Complainants' argument to the contrary is based on the notion, discussed in Professor Ramasastry's expert opinion and repeated in her Response, that a connection of direct linkage to an adverse impact may turn into one of contribution if the company fails to conduct human rights due diligence:

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 [...].¹⁸

The argument that there is a contribution due to a failure to conduct human rights due diligence, is circular. The issue under examination is what steps the Aker companies should have taken to meet the Guidelines' expectations to due diligence. This includes an assessment of the nature of a potential connection to the alleged adverse impact. Complainants are implying that the NCP, in its examination of the companies' due diligence, asks itself the following question: Was Aker BP's due diligence inadequate because it failed to identify that the due diligence would be inadequate (thereby leading to contribution)?

We submit that the NCP must examine the companies' due diligence on its own merits, not on assumptions of contribution to adverse impact. We are not suggesting that the due diligence should not assess the type of connection Aker BP might have to the alleged adverse impact, including a possible contribution. Such consideration was part of the due diligence and is described in our Response and Submissions. We shall just briefly repeat our assessment regarding the three types of connection addressed in the Guidelines.

The adverse impact in question concerns Lundin/Orrön's reduction of value after the transaction. We noted (and there can be no doubt) that the shrinkage of funds was a result of Lundin's resolution to distribute the merger consideration as dividend. Lundin's shareholders were involved both by approving the merger and dividend at the AGM, and as the recipients of the funds. Aker BP's role in relation to the impact stemmed from the agreement with Lundin to acquire Lundin's Norwegian oil and gas operations through a statutory merger.

In assessing the types of connection to an adverse impact, we noted that Lundin and Lundin's shareholders caused/contributed to the reduction of value. Through the transaction agreement, Aker BP had a business relationship with Lundin and Aker BP could therefore be "directly linked" to a potential adverse impact "caused or contributed to" by Lundin's actions. It was our assessment at the time, and still is, that Aker BP's part in the transaction agreement under no circumstance constituted contribution to the adverse impact in question.

¹⁷ Initial assessment, page 9.

¹⁸ Professor Ramasastry Response, page 33.

4. The companies' human rights due diligence - preliminary remarks

4.1 Introduction

The Complaints asserted that the Aker companies did not carry out a human rights due diligence. Our Response and Submissions gave an account for the companies' human rights due diligence in connection with the transaction. Complainants have now raised several points of criticism and assert that the companies' due diligence failed to meet the Guidelines' expectations. An initial observation is that for parts of their criticism, they seem not to have read our Response and Submissions thoroughly, and for others they seem to have misunderstood. We shall address the major points of criticism below. First, we shall comment on some of the Notes' preliminary remarks that are of a more general nature.

4.2 Stakeholder engagement and confidentiality obligations

The Notes offer some general remarks on stakeholder engagement and the relevance of confidentiality obligations. The Due Diligence Guidance describes what a stakeholder engagement entails:

*Stakeholder engagement is characterised by two-way communication. It involves the timely sharing of the relevant information needed for stakeholders to make informed decisions in a format that they can understand and access.*¹⁹

In the context of mergers and acquisitions, the possibility for a due diligence process involving stakeholders in this manner is affected by various types of confidentiality obligations. The complainants, however, dismiss such limitation:

*it is improper to suggest that customary non-disclosure contracts could not have been varied to permit adequate investigation of the human rights risks identified by stakeholders. Aker is a sophisticated party capable of negotiating a sophisticated contract to enable full human rights due diligence. The fact that they did not do so was elective and not mandatory.*²⁰

The notion that Aker could have negotiated exceptions to the standard non-disclosure obligations with Lundin to allow consultation with stakeholders or other third parties during the negotiation period is not realistic. Without accepting the non-disclosure agreement, Aker BP would not have come in position for exclusive negotiations with Lundin, let alone concluded a transaction agreement. There is nothing unique about the mutual non-disclosure agreements between Lundin and the Aker companies, these are standard and are an indisputable prerequisite for entering into negotiations in any commercial transaction of this type. No listed company would accept to enter into negotiations for a major transaction without strict confidentiality restrictions.

We also explained that insider information regulations precluded any disclosure of information related to the contemplated transaction prior to its announcement on 21 December 2021, including the fact that there was a dialogue about a potential transaction. These legal requirements restricted any sharing of information during the due diligence prior to the transaction agreement, which is when the terms of the transaction were negotiated. We have never suggested that insider trading regulations applied after that time and the Aker companies did meet with the stakeholders in January 2022, shortly after the merger plan was announced, and again in March 2022.

¹⁹ Due Diligence Guidance, page 18.

²⁰ Notes, para 14.

4.3 The essential unity of corporation

The complainants criticise our due diligence with respect to the companies Aker BP were to acquire, and we shall address this criticism below. Here we shall comment in some detail on the complainants' preliminary remarks about "the essential unity of the corporation". They assert that, for the purpose of the Guidelines, "a corporation and its subsidiaries [should be regarded] as a unified entity". This assertion is based on "several interconnected, mutually reinforcing and overlapping lines of thought"²¹. However, the analysis that follows completely miss the point. First, they pursue a line of legal arguments, which all concern parent company limited liability for a subsidiary ("the doctrine of piercing the corporate veil")²². This is a well-known legal concept, recognised by many legal systems in relation to tort claims. But this is not the issue here; the Specific Instance is not to consider whether the parent company (Lundin Energy AB) can be held liable for actions of its subsidiary but rather whether the subsidiary (Lundin Energy Norway AS) carries any liability regarding the (former) actions of its parent company. None of the sources quoted in the Notes address the issue of subsidiary liability for actions of its parent company and the argumentation does not lend any support to a general notion of corporate unity.

Complainants' legal line of thoughts continues by quoting three sentences from the U.S. Supreme Court in *Copperweld Corp. v. Independence Tube Corp.* as the basis for basis for declaring that "Authoritative courts have acknowledged the essential unity of the entities that make up multinational enterprises in the context of tort and crime." The reference is totally misleading, and the US Supreme court case is completely irrelevant to the argument the complainants are trying to establish. It is a landmark antitrust case where the court had to decide whether coordinated behaviour of a parent and subsidiary must be regarded as that of a single enterprise for purposes of antitrust law or should be subjected to anti-conspiracy scrutiny and antitrust sanctions²³.

Complainants' next line of argument is that strict corporate separation is a recognised obstacle to Responsible business conduct, quoting the UN Working Group on the issue of human rights and transnational corporations and other business enterprises:

*[...] the importance of a reform of corporate laws that should, among other things, consider how to ensure that the principles of separate legal personality and limited liability do not pose undue barriers to gaining access to effective remedies.*²⁴

Stressing that legal reform is needed to overcome obstacles to RBC standards do not imply that the legal entities within a group of companies should be regarded as one for the purpose of the Guidelines, on the contrary. The UN Working Group recognised that in the absence of legal reform, notions of corporate unity within a group of companies cannot be assumed when applying the Guidelines and other RBC standards.

The final line of thought does not concern the relationship between Lundin and Lundin Energy Norway AS with respect to corporate liability but argues that there is an "artificial legal barrier" between Orrön and Aker BP that should be disregarded for the purpose of securing the Sudan victims' right to remediation because "[a]ccess to remedy is an essential constituent of human rights protection [and that a] key objective of the OECD Guidelines is to ensure the right to remedy for victims of human rights abuses."²⁵ There is no basis, in law or under the Guidelines, to set aside the corporate separation between Orrön Energy and Aker BP, two large companies listed on the stock exchange in Stockholm and Oslo.

²¹ Notes, para 15.

²² The arguments are supported by references to the academic legal articles "Piercing the Corporate Veil in Corporate Groups" (Note 24) and "Shareholder Liability for Corporate Torts (note 25).

²³ <https://supreme.justia.com/cases/federal/us/467/752/>

²⁴ Notes, para 15.

²⁵ Notes, para 15.

We do not agree with this simplistic analysis of corporate unity but, in any event, the specific instance is to examine the companies due diligence in connection with the transaction and not an allegation that Aker BP has absorbed Lundin's responsibility in relation to violations of the right to life and other fundamental human rights.

Despite the reliance on legal doctrines of piercing through the limited liability of the shareholders, complainants argue for Lundin Energy Norway AS bearing the liability of Lundin, its parent company. The analysis did not consider the relationship between Lundin and its major shareholder and recipient of a large part of the merger consideration, or the wider Lundin Group of companies. Yet, they state:

*That the recent iterations of the Lundin Group and its various entities had not themselves produced the situation in Sudan is to miss the point. Breaches of human rights caused or contributed to by a company require remedy and there is no dispute that Lundin/Orrön carried that risk. Nor is there any sensible dispute that if Orrön cannot fund remedy, then the Lundin Group's ability to remediate will be extinguished.*²⁶

This is, as a matter of fact, not correct. The Lundin Group currently comprise 12 companies operating in mining, energy and renewables, with a current total market cap of CDN 25 billion (approximately USD 18.5 billion)²⁷.

5. Criticism of the due diligence approach and prioritisation

5.1 Introduction - adverse impact

The Notes set out complainants' criticism of the due diligence that was carried out. They allege that the due diligence failed to meet the expectations of the Guidelines because:

- 1) Aker²⁸ did not prioritise their main focus towards the severe risk they were warned about
- 2) Aker weighed Lundin's position over understanding other important facts
- 3) Aker's review of Orrön's capacity was inadequate
- 4) Aker failed to properly analyse the cost of remedy
- 5) Aker contributed to adverse impact through its own actions (and the due diligence should have identified the risk of such contribution).

We shall address the allegations in a slightly different order.

5.2 Approach to risk assessment

Complainants and Professor Ramasastry repeatedly state that "Aker weighed Lundin's position over understanding other important facts and so failed to assess the risk appropriately". Some examples are:

*Aker deferred to Lundin's assertions regarding the company's responsibility with respect to international crimes.*²⁹

Instead of referencing and weighing appropriately these factors [...] Aker uncritically observes that Lundin itself denies the alleged crimes and having contributed to human rights impacts in Sudan. PARA 43

Aker (a) noted that Lundin denied the alleged crimes but (b) failed to refer to the impressive basis for the decision to prosecute or for the implication that the prosecution

²⁶ Notes, para 84.

²⁷ <https://thelundingroup.com/>

²⁸ By "Aker" complainants are referring to Aker BP and Aker ASA jointly.

²⁹ Professor Ramasastry Response, 32.

*showed a high risk that Lundin had indeed contributed to adverse impacts on human rights.*³⁰

[...] nowhere in Aker's Response is there a reasoned assessment that balances that formidable indication that Lundin may be guilty against Lundin's assertion that they are not. Para 42

This is where we believe the complainants probably have not read our Response and Submissions very thoroughly or have chosen to overlook the account for our due diligence and the approach to assessing human rights risk arising from Lundin's former operations in Sudan. We did start with an initial observation that Lundin has refuted any responsibility for contribution to human rights violations in Sudan but then continued:

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. [...] the allegations themselves and the indictment was a "red flag" and needed to be addressed as part of the human rights due diligence. (para 13.4)

The numerous statements to discredit Aker BP's risk assessment and construct a deceptive picture that Aker BP's merely relied on Lundin's denial of any contribution to human rights impacts in Sudan, are not based on an earnest reading of our Response and Submissions.

5.3 Prioritisation

The starting point for complainants' criticism is that the Aker companies "*did not prioritise their main focus towards the severe risk they were warned about*". We must first point out that complainants have mistaken the time period for the due diligence in connection with the transaction. The Notes repeatedly refer to "*the human rights warnings, especially those contained in our complaints*". Complainants assert that the Complaints were "*timed precisely to deal with the emerging situation arising from Lundin's proposed shrinkage*":

*When 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.*³¹

The Complaints raised allegations that the due diligence that had been carried out in connection with the transaction, had failed to meet the expectations of the Guidelines. As pointed out by the NCP, "*such due diligence as the complaint [...] concerns must be carried out prior to a merger on the basis of the information known at the time*".³² The due diligence under examination was concluded well before the Complaints were filed on 31 May 2022, thirty days before closing of the transaction when all decisive steps for its implementation had been completed. It is not correct that "*Aker and Lundin were in confidential negotiations*"³³ when the Complaints were filed. This incorrect assumption forms the basis for complainants and Professor Ramasastry's comments on leverage, which will be discussed below.

The criticism of the companies' due diligence is based on an allegation that Aker BP "*chose an indefensibly selective approach to due diligence to fool themselves that the merger did not connect them to those*

³⁰ Notes, para 42.

³¹ Notes, para 83.

³² Initial Assessment, page 11.

³³ Notes, para 39.

risks”, stating that “It was artificial in that situation for Aker to focus human rights due diligence on the companies that it was buying”. Yet, the complainants acknowledge that Aker BP’s due diligence did not solely focus on the companies to be acquired but also included an assessment of Lundin/Orrön’s financial capacity to meet future claims and the main part of their criticism concern the companies’ due diligence related to this issue.³⁴

Assessing the connection between the target companies and the adverse human rights impacts allegedly contributed to by the parent company is the logical starting point for a human rights due diligence on the transaction. As pointed out in our Response and Submissions, this starting point seem to malign with referred to Professor Ramasastry’s expert opinion, which primarily focussed on human rights due diligence with respect to the companies to be acquired. That is not to say that an assessment of the target companies was sufficient. Professor Ramasastry’s Response repeatedly misrepresents the companies’ approach to due diligence:

*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.*³⁵

We have not suggested that mergers and acquisitions are exempt from the expectations to due diligence, on the contrary.

*The first [argument made by the companies] 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.*³⁶

We have not suggested that the scope of human rights due diligence during mergers and acquisitions is “solely on the target”, on the contrary.

*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.*³⁷

We have not suggested that the timing or other characteristics of mergers and acquisitions absolve a company from its human rights due diligence obligations, on the contrary. Orrön’s financial capacity to address remediation.

³⁴ With respect to the target companies, complainants maintain that Aker BP’s due diligence should have identified a connection between Lundin Energy Norway AS and the alleged war crimes in Sudan, repeating the assertion that the acquisition of Lundin’s Norwegian assets from DNO was funded with the proceeds from the sale of the Sudan operations. They refer to one sentence in Lundin’s Q3 report for 2003. Our Response and Submissions referred to contemporary sources to the contrary. In any event, the funding of the assets in 2003 does not create a connection as stated. Complainants also assert that Aker BP incorrectly identified that “no allegation had ever been made that Lundin Energy Norway AS carried any liability or responsibility to compensate victims” and provided an extensive list in Annex 2 to the Notes reflecting critical press coverage in Norwegian media over several years. A scrutiny of the articles show that they cover the allegations against Lundin Energy AB, and we cannot find any allegation that Lundin Energy Norway AS carried any liability or responsibility to compensate victims or was otherwise connected to the alleged human rights impact in Sudan.

³⁵ Professor Ramasastry Response, para 4.

³⁶ Professor Ramasastry Response, para 7.

³⁷ Professor Ramasastry Response, para 25.

5.4 The alleged adverse impact

The Complaints had asserted that the companies' due diligence was inadequate because it failed to identify that the transaction inevitably would result in the *future financial inability* of Orrön Energy to address remedy. This is an allegation of a potential adverse impact. The allegation rested on factual premises regarding two crucial issues, both of which the Complaints had merely stated as undisputable facts and not attempted to substantiate. As explained in the Introduction, the Response and Submissions therefore sought to *clarify the factual presumptions* underpinning the Complaints regarding (i) the financial means required for Orrön to engage in a remedy process and provide for reparation as expected under the Guidelines (loosely referred to as "*cost of remedy*") and (ii) the financial means that would be required for Orrön to do so. The latter in turn rested on a set of assumptions about the type of company Orrön would turn into after the merger. Hence, Part II, sections 10-12 of our Response and Submissions was not an account for the inquiries conducted as part of the due diligence as complainants seem to infer, that was addressed in Part III. We were merely trying to fill the gaps of information provided by complainants regarding facts they asserted the due diligence would have identified.

The criticism of the due diligence regarding the cost that would be required for Orrön to engage in a remediation process as recommended by the Guidelines, have two limbs: (i) the type of remediation that would be relevant, both with regard to process and substantive remedy; and (iii) the estimates of the costs likely to be involved. We shall address them in order, before turning to the issue of assessing Orrön's financial capacity following the transaction.

The parties' diverging views primarily lies in a different understanding of what would be required for Lundin/Orrön to engage in a remediation process as recommended by the Guidelines. The difference between the parties' approach to this assessment lies in the *relevance* of the complainants' estimates as much as the calculation of an estimate. The parties' opposing views on the steps required for an adequate due diligence rest on their respective perceptions of the Guidelines' expectations in this respect, as accounted for in Section 2.

5.5 Criticism of the due diligence concerning the type of remediation

Aker does not appear to appreciate the requirements of a remediation and reparation process. They make no attempt to identify how such support would make good the adverse impact towards the stakeholder victims we represent.

The criticism against the companies due diligence is that it failed to make in-depth inquiries about what type of remediation process with Lundin the victims would deem as acceptable. Complainants quote the OHCHR, which states that " ... *it is important to understand what those affected would view as an effective remedy, ...*" and note that the same expectation is expressly applied to the OECD Guidelines (referring to the due diligence Guidance and the practical suggestions in Annex Q50).³⁸

The expectations of stakeholder engagement to establish an acceptable framework for addressing remediation would belong to the dialogue between victims and the company responsible engaging in a remediation process to address adverse impact that company has caused or contributed to. No such dialogue has yet taken place with Lundin or the other oil companies in the consortium. Inquiries into this issue is clearly not a step that would be expected of Aker BP as part of its due diligence on the impact of the transaction.

³⁸ Notes, para 58 and footnote.

Complainants have misread our account for the inquiries and observations that were made as part of the due diligence. We have not suggested that “*the process of assessing human rights impacts is made contingent on whether affected people raise claims through formal procedures*”, nor have we attempted to “*point the finger at victims for not bringing formal reparation claims*”³⁹. Likewise, the observation that victims had not initiated a specific instance against Lundin before the Swedish NCP, was relevant. Complainants assert that the due diligence required an extensive examination of Lundin’s alleged responsibility for remediation under the Guidelines, including an assessment of “the requirements of a remediation and reparation process”. The NCP procedure is one of the “legitimate remediation mechanisms” referred to in the Guidelines and is the most accessible process to address allegations regarding a company’s failure to comply with the Guidelines and remediation claims for adverse human rights impact.

Another point of criticism concerns the type of substantive reparation that would be expected in a remediation process under the Guidelines, which the complainants refer to as “Guidelines compliant compensation, which require payment of a tort law type claim for damages. On this assumption, they set out the kind of inquiries they assert Aker BP should have considered in the due diligence:

*A fundamental difference [between tort law and effective remedy] is that the latter must be agreeable for the rightsholders. It is best practice in the design and execution of corporate remedy and reparation processes to consult and seek consent from the rightsholders for each and every step. Complainants represent adversely affected communities and can confidently state that pecuniary compensation for remediation of physical and moral damages is customary in Nuer society.*⁴⁰

Concerning a right to substantive reparation, we should first reiterate Professor Emberland’s expert opinion that the right to an effective remedy does not extend to a right to reparation. But even if it were, the criticism of the due diligence misses the point. Reparation should aim to “make good” the harms. Complainants refer to a notion of “Guidelines compliant compensation”, based on several assumptions regarding reparation of the harm that occurred two decades ago, including of 12,000 deaths and 75,000 attempted homicides. Firstly, that reparation needs to be financial in nature because, as Dr. van Ho points out, “*not even an oil company can bring back the dead*”⁴¹. Secondly, that adequate compensation should be based on a collective claim for damages raised on behalf of approximately 160,000 people. Thirdly, that the likely magnitude of such reparation should be estimated as the value attached to each type of damages, multiplied with the number of occurrences during 1999-2003 and adjusted for inflation (a compensation claim that has not, and will not, be subject to a judicial process⁴²). With the utmost respect for the victims’ plea for remedy for the human rights violations they suffered at the hands of the Sudanese army, we question the assumptions upon which the estimated “cost of remedy” is based.

5.6 Criticism of the due diligence concerning cost of remediation

*The other crucial substantive issue that Aker should have properly assessed in its human rights due diligence is the cost of remedy. Aker rightly points out that due diligence on the merger required an assessment of Lundin’s ability to meet future financial obligations, specifically those stemming from its Sudanese operations. A credible indication of the costs of effective remedy of adverse impacts would be essential to the assessment.*⁴³

³⁹ Notes, para 66.

⁴⁰ Notes, para 61.

⁴¹ Dr. van Ho Response, para 14.

⁴² As a collective claim for damages on behalf of 160.000 people.

⁴³ Notes, para 53.

Our point was that the complainants themselves had dedicated no more than one sentence to the most central issue underpinning the Complainants, with no attempt to substantiate or elaborate. Moreover, the “only available estimate” presented in the Complaints, contradicted that which they had presented to the Aker companies two months earlier. PAX has consequently referred to “Lundin’s share of the liability”. Prior to Lundin’s AGM to approve the merger and the dividend, PAX had formally informed Lundin’s board and shareholders that the victims’ claim was estimated at USD 700 million. For the complainants to present a figure 2.5 times that amount to the NCP as the “only available estimate” was simply disingenuous.

The ease with which complainants juggle billion-dollar figures is astonishing. First, they requested the NCP to base its examination on “the only available estimate” of 1.787 billion, an amount 2.5 times that which they presented to Lundin and Lundin’s shareholders (as well as the Aker companies). They saw no need to explain, elaborate or substantiate the claim. Instead, the one-sentence statement was repeated in the Submissions. The Notes make a half-hearted attempt to justify the inaccurate information to the NCP and even criticises Aker BP’s due diligence for not having considered that the figure PAX had provided, was not the relevant one:

*We contend, however that a primary tortfeasor, as Lundin was according to the Swedish Prosecutor, can probably be held fully responsible for damages in either case. It is therefore not unreasonable to assume joint responsibility, and it is a reasonable expectation of Aker to inform themselves about this question as part of their due diligence.*⁴⁴

On top of that, complainants now casually suggest that the NCP base its examination on USD 13.2 billion as “the most reliable estimate”, provided by an expert on Sudanese tort law in August 2023:

*Again, this recent estimate is not an assessment of costs of remedy, but a relevant indication of the magnitude of the remedy effort that will be required, based on the advice of a Sudanese legal expert. We believe that this more recent estimate is the best available point of reference in the Specific Instance.*⁴⁵

The legal opinion Dr. Babiker, filed by the 32 South Sudanese plaintiffs in the Swedish legal proceedings as the basis for their civil claims, estimate compensation requirements under Sudanese tort law for four categories of damages. Complainants multiply the estimated amount for individual damages with their estimated occurrences during 1999-2003, resulting in these figures: (i) deaths (12,000 - total damages appr. USD 1 billion); (ii) attempted homicide (75,000 - total damages appr. USD 6.3 billion), forced displacements and loss of house and belongings (140,000 - total damages appr. USD 5.9 billion), and cattle lost (500,000 - total damages appr. USD 100 million).⁴⁶ Thus, complainants assert, the relevant basis for assessing the magnitude of the remedy effort that will be required, is an estimate of USD 13,293,611,000.⁴⁷

This figure is more than the entire value of Lundin at the time of the transaction. The suggestion that this figure is the best point of reference for the NCP when examining the Aker companies’ due diligence obviously cannot be taken seriously.⁴⁸ But the proposal is useful as it clearly demonstrates just how unsuitable the complainants’ approach to estimating cost of remediation, is.

⁴⁴ Notes, para 55.

⁴⁵ Notes, para 56.

⁴⁶ Notes, para 56.

⁴⁷ Which “may actually be on the low side, not least because it considers ignores important other types of damages like loss of income and enslavement”. Notes, para 56.

⁴⁸ An estimate produced in August 2023, long after the merger was completed, would in any event not be relevant for the examination of the companies’ due diligence in connection with the transaction.

The due diligence did not attempt to estimate the size of potential a collective compensation claim, neither under Swedish tort law nor Sudanese law and custom. For reasons explained above, we do not see a tort law-based claim for collective damages caused by the war in 1999-2003 as the relevant vantage point for assessing the financial commitment that would be required for Orrön to meet the Guidelines' expectations regarding remediation. In our opinion, such inquiries were beyond the expectations to Aker BP's due diligence in connection with the transaction. Regardless of this, we shall comment on the complainants' account for what the companies' due diligence into this issue would have required since it goes to the core of the issue before the NCP.

Complainants assert that "*Aker drew conclusions about [cost of] remedy based on what it found to be incomplete information but without taking the obvious and necessary steps to inform itself*"⁴⁹. The Notes list what complainants consider as necessary steps:

They did not engage with us, the stakeholders who had published these figures to find out how the sums had been calculated.

They [...] have taken no steps to engage the expertise of persons such as Prof. Levinsohn or of Dr Babikir.

*They took no steps to enquire as to whether other experts - or those among our group who have dedicated decades to forming an expertise on this issue - were available to clarify any aspect [of the estimate].*⁵⁰

*[Aker did not engage to] note the rules and customs for doing justice for suffering and damages in the Nuer culture includes economic rehabilitation, reparation, restitution and compensation.*⁵¹

The due diligence did not take any of these steps. In our opinion, such detailed and in-depth inquiry to establish the likely size of claims that the victims might raise (in a legal process or any other form), was beyond the expectations to Aker BP's due diligence in connection with the transaction. We also note that even the complainants have not deemed it relevant to (publicly or in the Complaints and Submissions) refer to Professor Levinsohn or the 2006 US legal proceedings as the basis for the USD 1.787 billion estimate. Nor have they referred to the expertise of Dr. Babikir on Sudanese tort law before it was introduced in the Swedish legal proceedings in August 2023 or made any reference to Sudanese law and Nuer customs as the relevant basis for estimating the cost of reparation.

5.7 Criticism of the due diligence concerning Orrön's future financial capacity NY TEKST

Complainants no longer depict Orrön as a near-empty vehicle designated to carry the Sudan liabilities. They now perceive this listed, billion kroner company with major institutional investors as shareholders, as a "*corporate minnow*"⁵² and "*a small company [with] a mediocre market confidence in its future profitability*"⁵³, suggesting:

*[...] one key inference to be drawn from Aker's focus in their submissions on the future value of Orrön is that they have been silent about Orrön's present value because - consistent with the evidence we have presented - there is no sound basis that Aker (or indeed the NCP) could assert that Orrön is robust enough to pay those sums.*⁵⁴

⁴⁹ Notes, para 53.

⁵⁰ Notes, para 57.

⁵¹ Notes, para 60.

⁵² Notes, para 28.

⁵³ Notes, para XX.

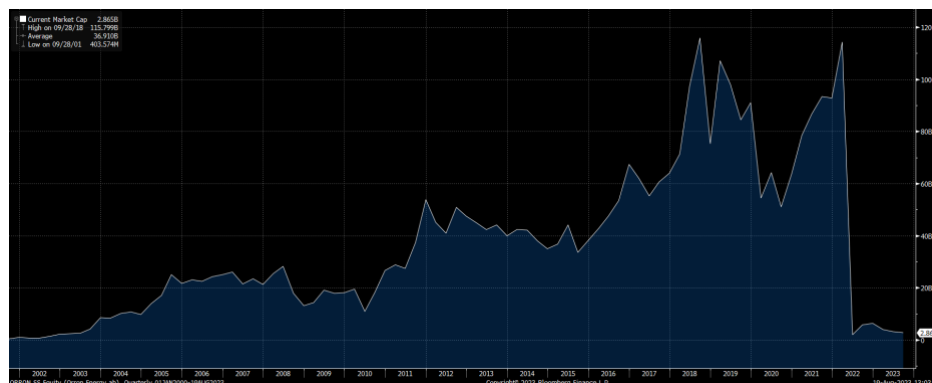
⁵⁴ Notes, para 50.

To focus on anything but the future value of Orrön would not address the issue raised in the specific instance. The Complaints concerned the potential adverse impact due to the “foreseeable future financial inability” of Orrön to provide for remediation. We also fail to understand the complainants preoccupation with the current share price of Orrön. The NCP will examine the due diligence in connection with the merger and therefore the soundness of Aker BP’s assessment at the time of the transaction. A general observation in the stock market is that it is relatively short-term focussed and that a short-term market cap does not necessarily reflect the value of a listed company. When we did comment on Orrön’s share price immediately following the transaction, it was merely to confirm that the market shared the assessment we made at the time of the due diligence.⁵⁵

The point we made in our Response and Submissions was that the complainants have made no assessment of Orrön’s future financial capacity to back up the claim, but merely rely on the book value at that particular point in time, to compare with a highly inflated indication of the cost required for remediation (if nothing else, 2.5 times higher than their estimate of Lundin’s responsibility for reparation). This is an over-simplified approach to assessing the financial capacity of a listed company. A proper financial analysis is far more sophisticated than that underpinning the allegations and will focus on analysing not the book value but the prospects of the underlying assets. Complainants dismiss our arguments, stating “it is self-evident that it is not advisable to rely on a corporation’s self-presentation to assess its financial prospects.”⁵⁶ They may have misunderstood, as our reference to Orrön’s presentations merely reflected the factual basis for the considerations. The assessment of Orrön’s capacity for future value-creation was informed by independent financial analysis of the underlying values and business prospects. Other professionals analysts shared our assessment at the time.

Lundin has always shown extraordinary capacity for growth, as illustrated by the graph below of market value (SEK bn) of Lundin from 2001 to 2023. The graph shows how market cap fluctuates but, even more, it shows Lundin exceptional growth over these two decades. Lundin’s market cap following the closing of the merger, was in fact the same as at the time of Lundin’s withdrawal from Sudan.

Lundin market value 2003 to 2023 (SEK billion):



The market view of Orrön’s business immediately following the transaction is reflected in an analysis by Pareto Securities in July 2022 ([attachment 1](#)). Based i.a. on an evaluation of the value-creating potential of the underlying assets and Lundin’s strong track-record, Pareto Securities valued Orrön between SEK 4.0 billion and SEK 5.7 billion (whilst the market cap was SEK 2.2 billion):

⁵⁵ The renewables sector has experienced a fall due to short term changes to interest rates and inflation as well as supply chain challenges. However, the long-term prospect in this sector remains positive, as was our assessment at the time of the transaction.

⁵⁶ Notes, para 51.

We expect Orrön Energy to expand rather quickly and opportunistically into new renewable energy projects, to grow the new investment leg of the company. Some of these may be brownfield projects, where the company will use its in-house competencies to develop and grow the acquired businesses. In our base-case scenario, we calculate a fair net asset value for Orrön Energy of SEK 16.5 per share, and an upside potential to SEK 20 per share including firepower for M&A.

The Lundin Family is the main shareholder of Orrön Energy with some 33% of the share capital and as such offers financial stability and support to the company. The financial capability resources and industrial knowledge of the Lundin Family are second to none, which should benefit all shareholders in Orrön Energy. [...] Orrön Energy will of course also benefit in idea and deal generation from being part of the Lundin Group of Companies, a group of 11 companies with a combined market cap as of the end of May 2022 of some USD 34bn.

A central component to the assessment regarding Orrön's future financial capacity to address remediation, is the time at which the question could arise. Complainants assert that our estimate of it being at least 7-8 years from the time of the transaction "was an unrealistic assessment of the point in time where Orrön's financial capacity was potentially relevant to the victims' possibility of obtaining remedy"⁵⁷. The judgment from Stockholm City Court is expected at the end of 2026, five years after the due diligence on the transaction. An appeal is highly likely⁵⁸ On this issue, it is also relevant to consider Orrön's position that it will await the outcome of the criminal proceedings before considering a remediation process. The fact is that, with nor without the transaction, a remediation process with Orrön would not materialise before at least 7-8 years, probably longer.

5.8 Criticism concerning use of leverage

The complainants acknowledge that the companies' due diligence did address Orrön's future financial capacity but assert that the due diligence did not proceed to "*following- up on step 3 of human rights due diligence, which is to address human rights impacts that the company risked contributing to via the merger*". We have not identified a risk of contribution. Aker BP had a business relationship with Lundin, whose conduct allegedly caused an adverse impact on the right to remedy.

A company is expected to address this situation by seeking to "*prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship*", but, as emphasised in the Guidelines: "*This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*"⁵⁹ The Due Diligence Guidance elaborates on the expectation (emphasis added):

*In cases where impacts are directly linked to an enterprise's operations, products or services, the enterprise should seek, to the extent possible, to use its leverage to effect change, individually or in collaboration with others (emphasis added).*⁶⁰

There are numerous allegations throughout the Notes regarding the Aker companies' failure to use leverage to prevent the alleged adverse impact:

⁵⁷ Notes, para 48.

⁵⁹ Ch. II, para 12 of the 2011 Guidelines.

⁶⁰ Due Diligence Guidance, page 17.

At any point in time during the process of the merger [...] It was open to Aker to negotiate any appropriate term needed to secure the remedy.⁶¹

Aker accepted the merger structure that Lundin proposed instead of requiring that the access to remedy would remain assured.⁶²

Aker finalized the merger without amending the deal or requiring any safeguards (as had been suggested in the Complaint to prevent the problem) to ensure that the obvious and stark risk was mitigated.⁶³

It is now confirmed by Aker that they did not use their leverage to seek assurance of remedy during the negotiation of the merger. For example, they did not seek contractual assurances and warranties from Lundin with respect to unaddressed remedy obligations (albeit they instead protected themselves by obtaining the indemnity from Lundin).⁶⁴

The complainants assert that Aker apparently did not obtain the required assurance and must conclude that the exercise was not consistent with the expectations of human rights due diligence.⁶⁵

These allegations merely assume that it was up to Aker BP to ensure such changes. It will be useful to revisit what the Guidelines' recommendation that a company use its leverage to prevent or mitigate an (potential) adverse impact that it is directly linked to through a business relationship, entails. The concept of "leverage" in the context of human rights due diligence is defined in the Guidelines' Commentary to (emphasis added):

Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes harm (emphasis added).⁶⁶

Aker BP did not have the ability to effect such changes in the transaction structure as suggested by the complainants or Lundin's decision to distribute the sales proceeds as dividend or the size of the dividend. Lundin had resolved to sell the oil and gas business and go forward as a pure renewables company. It was not acceptable to Lundin to retain shares in an oil and gas company. Aker BP did, to the extent possible, seek to ensure that Lundin/Orrön remained a sufficiently robust company after divesting the oil & gas business. We might also add that there were others with more leverage than Aker BP, such as Lundin's major shareholders.

Complainants' position is that, in the absence of leverage to change the transaction structure or Lundin's dispositions, Aker BP should have renounced the acquisition:

Aker itself could and should have exercised its leverage on Lundin during the merger negotiations to pressure the company to live up to its obligations under the Guidelines and, alternatively, have discontinued the merger.⁶⁷

We cannot see that the Guidelines' expectations to use leverage to mitigate a potential adverse impact would require Aker BP to withdraw from the acquisition of Lundin's oil and gas operations.

⁶¹ Notes, para 78.

⁶² Notes, para 47.

⁶³ Notes, para 84.

⁶⁴ Notes, para 77.

⁶⁵ Notes, para 46.

⁶⁶ 2011 Guidelines, Ch. II, Commentary, para 19.

⁶⁷ Notes, para 49.

6. The allegations against Aker ASA

In accordance with the Initial Assessment, our Response and Submissions focussed on Aker BP's due diligence. Complainants filed a separate complaint against Aker ASA, whilst the Submissions and Notes do not distinguish between the roles of the two companies. They are referred to jointly as "Aker" and it is explicitly stated that the allegations are directed equally at the two companies.

Aker ASA is an industrial investment company that exercises active ownership through board positions, communication of expectations, and regular follow-up/reporting. This includes expectations of responsible business conduct including a clear expectation that the portfolio companies adhere to the OECD Guidelines. Aker ASA's role in relation to its portfolio companies is described on www.akerasa.com:

Through active board-level participation, Aker supports further development and strengthening of its portfolio companies. This includes both operational and strategic improvements, and through financing, restructuring and M&A.

Aker ASA (via its subsidiary Aker Capital AS) currently owns 21.2% of the shares in Aker BP. At the time of the transaction, the three largest shareholders were: Aker Capital AS (37.14%), BP Exploration Op. Co. Ltd, UK (27.85%) and Folketrygdfondet (the Government Pension Fund Norway) (3.44%). Hence, Aker ASA did not have a controlling interest in Aker BP, nor did Aker and BP have joint control in relation to decisions that require a two thirds majority, such as a merger. Øyvind Eriksen and Kjell Inge Røkke represent Aker ASA on Aker BP's Board of Directors and do not represent Aker BP in any other capacity. There is no overlap of management between the two companies and the management of Aker BP is fully independent.

In major transactions involving portfolio companies, Aker ASA works alongside and supports the companies' transaction teams. In respect of the acquisition of Lundin's oil and gas business, Aker ASA assisted Aker BP in the transaction work, including the due diligence. Aker ASA therefore ensured that Aker BP carried out a due diligence on the human right aspects of the transaction. Aker ASA shared the assessments that were accounted for in our Response and Submissions. Consequently, there is no basis for the allegations that Aker ASA failed to use leverage over Aker BP to carry out human rights due diligence, as claimed in the Complaint and Submissions (prior to the account for due diligence provided in our Response and Submissions).

The Guidelines expectations to investors take a different form than those to its investee companies. An investor has a business relationship with the companies in which it is a shareholder and could therefore be directly linked to actual or potential adverse impacts that the investee company has caused or contributed to. In our case, Aker BP had a business relationship with Lundin and Aker ASA, as shareholder, has a business relationship with Aker BP. Regarding the due diligence expectations to investors, the Submissions state:

*The OECD Guidelines require investors to identify, prevent and mitigate actual and potential adverse impacts of investee companies. According to the Guidelines, investors can contribute to impact through its investments. "In some instances investors may be contributing to impacts caused by their investee companies and may be responsible for remediation. These situations could arise where investors wield significant managerial control over a company, ..."*⁶⁸

⁶⁸ Submissions, para 41.

The quote from the OECD guide on Responsible business conduct for institutional investors stops mid-sentence. It might be helpful to complete the quote:

These situations could arise where investors wield significant managerial control over a company”, for example, in certain General Partnerships. However, in the context of adverse impacts arising from investee companies, investors will in most instances not cause or contribute to, but only be directly linked to the adverse impact.⁶⁹

Repeating the partial quote, complainants conclude:

Consequently, Aker ASA contributed to the adverse impact via its investee company Aker BP ASA and shares the responsibility with Aker BP ASA to ensure that the adverse impact that both companies have contributed to is effectively remediated.⁷⁰

The example refers to General Partnerships, where there is a further connection on top of that between an investor and its investee company. That is far from the “active board-level participation” described on Aker ASA’s website. Aker BP is a listed company on Oslo Stock Exchange; Aker ASA is not a majority shareholder; Aker ASA does not hold a majority of seats on the Board and Aker ASA does not wield significant managerial control over Aker BP.

7. The outcome of the NCP’s examination

The Aker companies appreciate the effort by NCP to facilitate a dialogue and mediation process between the parties and regret that it did not lead to an agreement regarding the issues under consideration. In our meeting with the representative for the Sudanese victims, we expressed sympathy for their suffering during the civil war and acknowledged their pursuit of justice. However, it became evident that the parties’ understanding of the issues and expectations to the outcome were too far apart. These differences will have become clear to the NCP through the subsequent written submissions from both sides.

The Notes start and end with suggestions that the NCP should make recommendations for an amicable solution between the parties:

We believe that only through engagement with victims, Aker can resolve their differences. We - the Complainants - would of course be willing to assist in facilitating and to participate in that process, and we stand ready to assist with any practical steps we might take to assist remedy for the victims in Sudan. We therefore suggest that, in addition to an assessment of whether the Guidelines have been breached and associated recommendations, the NCP’s final statement should also contain recommendations for an amicable resolution. We furthermore suggest that such recommendations take notice of a relevant example of good company practice consistent with the Guidelines in response to the complaint that was brought before the Australian NCP by the Human Rights Law Centre and landowners from Loloho and Rorovana areas of Bougainville against Rio Tinto.⁷¹

The Specific Instance will consider the companies’ due diligence in connection with the transaction. Complainants desired outcome illustrates clearly their objective with the specific instance; they are no longer addressing the companies’ due diligence into Orrön’s future ability to engage in remediation, they are seeking remediation from the Aker companies for Lundin’s alleged contribution to adverse impact in Sudan 20 years ago. We also question the proposal that the NCP make “recommendations for an amicable

⁶⁹ [RBC-for-Institutional-Investors.pdf \(oecd.org\)](#), p. 20, referenced in Submissions, footnote 73.

⁷⁰ Submissions, para 43.

⁷¹ Notes, para 89.

resolution” outside the dialogue and mediation procedure, especially when the parties have engaged in mediation but failed to find common ground for further discussion. The reference to the Rio Tinto matter before the Australian NCP as a relevant example further demonstrates that it is the long-standing conflict with Lundin/Orrön the complainants seek a resolution to.⁷² Aker BP does not have a responsibility towards compensation. Aker BP is not the right company to seek to engage in a remediation process.

8. Concluding remarks

We have focused on the main issues and points of criticism raised in the Notes, considering the volume of documents already filed and bearing in mind the non-judicial nature of the Specific Instance procedure. We have not endeavoured to respond to all comments and assertions in the Notes with which we disagree but have sought to address the main issues. We see no need to detail and rebut all statements we perceive to be inaccurate or misrepresenting as complainants do in Annex 2 to the Notes, and we have not commented on that list. Extensive documentation has been presented from both sides and we trust that the NCP will have a solid foundation for its examination.

We await the NCP’s guidance and recommendations on the Guidelines’ expectations to due diligence in this type of transactions. The Aker companies are continuously striving to develop and improve their policies and guidelines. Since 2021, the procedure for due diligence in connection with mergers and acquisitions has been revised and clarified several times and it has been expanded with respect to assessment of human rights impact, [also informed by the learnings from the specific instance.]. With the implementation of the Transparency Act, the recommendations regarding human rights due diligence set out in the Guidelines have been transposed into legal requirements, all our policies, guidelines and procedures have been reviewed to ensure alignment with the due diligence procedure set out in the OECD Guidelines.

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Lysaker, 9 September 2024

Aker BP ASA

Aker ASA

⁷² The specific instance concerned communities in Papua New Guinea impacted by the former mining operations of a company in which Rio Tinto was the majority owner at the time.