

Complaint to the Norwegian National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises

NCP

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Subject

Alleged non-compliance with the OECD Guidelines for Multinational Enterprises by Aker ASA in relation to its substantial contribution to the statutory merger between Aker BP and Lundin Energy.

Date

31 May 2022.

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1. Introduction

This document sets out a complaint against Aker ASA, a Norwegian incorporated enterprise, regarding breaches of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) via substantially contributing to the acquisition through a statutory merger by its investee company Aker BP of Lundin Energy AB's Norwegian oil and gas business, representing over 96% of the latter's net asset value. Lundin Energy AB ("Lundin Energy") is a Swedish incorporated enterprise. The merger is planned to take effect by the end of June 2022.

The merger creates a direct link between Aker BP with Lundin Energy. Lundin Energy's Chair Ian Lundin and its Director and former CEO Alex Schneider have been indicted for complicity in grave war crimes committed in South Sudan, crimes that by their nature cause severe damages and harm to people.¹ The charges relate entirely to their actions as executives of Lundin Energy. As is well-documented by numerous human rights bodies, including successive United Nations Special Rapporteurs on Human Rights in Sudan, Lundin Energy's operations in South Sudan were directly linked to systematic violations of international humanitarian law and other egregious human rights abuses.² Lundin Energy itself is directly implicated in the charges via a request by the Swedish prosecutor to the court to declare its South Sudanese operations a criminal enterprise and forfeit all benefits. In Sweden, forfeited criminal revenues are collected by the Ministry of Finance and are not earmarked to benefit victims of crimes.

Lundin Energy has not assessed and addressed its human rights impact in South Sudan and victims of human rights violations have not had access to effective remedy and reparation.

Aker ASA is the main shareholder of Aker BP and wields a decisive influence over its management. Aker ASA has actively and substantially contributed to the realization of the merger agreement between Aker BP and Lundin Energy through which Aker BP acquires Lundin Energy's valuable assets. The merger agreement establishes that the Lundin Energy will continue to carry all costs and liabilities related to its South Sudanese operation. The Complainants assert that the merger foreseeably deprives Lundin Energy of the ability to fulfil its responsibility under the OECD Guidelines as it deprives it of the means to adequately address severe ongoing (unremediated) impact.

As an organization that qualifies as a multinational enterprise under the OECD Guidelines, Aker ASA should be held to the standards of the OECD Guidelines. This complaint is submitted by five South Sudanese and four European organizations on behalf on an estimated 200.000 South Sudanese victims of gross and systematic human rights violations. The Complainants assert that Aker ASA has facilitated and incentivized Aker BP to sign a merger agreement. The Complainants assert that this merger compels Lundin Energy to fail its responsibility under the OECD Guidelines as it leaves the company with insufficient means to address severe ongoing (unremediated) impact. The Complainants submit that Aker ASA has breached Chapter IV (Human Rights) of the OECD Guidelines because it 1) failed to conduct HRDD on the merger; 2) failed to meaningfully engage with stakeholders; and 3) substantially contributed to the facilitation of ongoing (unremediated) impact.

¹ <https://www.aklagare.se/en/media/press-releases/2021/november/prosecution-for-complicity-in-grave-war-crimes-in-sudan/>

² <https://unpaiddebt.org/resources/documentation/>

2. Criteria for the Norwegian NCP's initial assessment

The Complainants respectfully submit that the issues raised in this complaint are bona fide and relevant to the implementation of the OECD Guidelines. The following sections address the criteria that the NCP should consider when making an initial assessment.³

2.1. The identity of the parties concerned and their interest in the matter

2.1.1. The multinational enterprise (MNE): Aker ASA

Aker ASA is a private investment company registered and headquartered in Fornebu, Norway. The company is listed on the Oslo Stock Exchange and has substantial interests in internationally active companies. As the Norwegian Government adheres to the OECD Guidelines, Aker ASA is an MNE with responsibilities under the OECD Guidelines.

2.1.2. The Complainants

This complaint is submitted by three South Sudanese and four European organizations who represent an estimated 200.000 South Sudanese victims of gross and systematic human rights violations and/or advocate for their right to remedy and reparation. In alphabetical order:

The *Civil Society Coalition on Natural Resources* was established in 2018 in Juba, South Sudan, by 43 civil society organizations. The Coalition coordinates and aligns their work for sustainable development, responsible exploration of natural resources, and the use of its revenues for the benefit of the citizens of South Sudan.

Global Idé is a Swedish civil society organization that has since 2015 worked for the right to remedy and reparation of victims of the oil war in Sudan.

Liech Victims Voices is a network of victims of the 1997-2003 oil war in Block 5A, South Sudan. Since 2016, the organization publicly advocates for their right to remedy and reparation.⁴

Norwegian Church Aid works with people and organizations around the world in their struggle to eradicate poverty and injustice. NCA has been in South Sudan since 1972, working with and through faith-based and civil society partners. Though its longevity in South Sudan, NCA has gained trust from faith-based organizations and local churches. These partners are important as they have a long history of being strong and vibrant champions of peace and justice in the country and have gained the trust of the local population. NCA was also a founding member of the European Coalition on Oil in Sudan, that

³ OECD, 2011, OECD Guidelines for Multinational Enterprises, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, I. Commentary on the Procedural Guidance for NCPs, Initial Assessment, page 82-83, paragraph 25.

⁴ <https://unpaiddebt.org/remedy-claim/>.

led a European campaign against the role of European oil companies in the oil war of 1997-2003 in Block 5A.

Norwegian People's Aid is the Norwegian labour movement's humanitarian solidarity organization. NPA has been active in South Sudan for decades, where it e.g. supports civil society organizations and local communities that advocate for responsible exploitation of oil resources. NPA was a founding member of the European Coalition on Oil in Sudan (ECOS), that led a European campaign for responsible business conduct of European oil companies from 2000-2013, and engaged with European oil companies during the oil war of 1997-2003.

PAX is a Dutch peace and human rights organization based in Utrecht. Between 2001 and 2013, PAX coordinated ECOS.⁵ Until 2003, PAX coordinated the campaign 'Peace First!' in Europe, that advocated for suspension of oil exploitation until peace would have come. In 2010, PAX wrote the report *Unpaid Debt for ECOS*.⁶ After publication, the Swedish Prosecution Authority opened a criminal investigation into the reported crimes and Sweden. PAX monitors and reports about the legal case⁷, and advocates that Lundin Energy complies with the UNGP and with the OECD Guidelines.⁸

The *South Sudan Council of Churches* is an South Sudanese Ecumenical body comprised of seven member Churches and associate Churches with a strong legacy of Peace building, reconciliation, and advocacy. In 2000, the SSCC (then NSCC) called for suspension of oil exploitation until peace would have come. It engaged in vain with oil companies to bring their conduct in line with their human rights responsibilities. SSCC actively supports the quest for justice of victimized communities in Block 5A, where Lundin Energy used to operate.⁹

Swedwatch is an independent, Swedish, non-profit research and advocacy organization that investigates the extent to which companies, investors and authorities are taking responsibility for human rights and the environment. In 2017, Swedwatch published a report about the human rights responsibilities of Swedish institutional investors in Lundin Energy.¹⁰

2.2. Background

In 1997, the Swedish oil company Lundin Oil (now Lundin Energy) signed a contract with the Government of Sudan for the exploitation of oil in the concession area called Block 5A that was not at that time under effective Government control. The start of oil exploitation set off a vicious war in and around Lundin Energy's concession the area, called Block 5A. The area presently belongs to South Sudan.¹¹

⁵ <http://www.ecosonline.org/>

⁶ <https://unpaiddebt.org/unpaid-debt-report/>

⁷ <http://www.unpaiddebt.org/>

⁸ See e.g. <https://www.lundinsudanlegalcase.com/company-statements/>.

⁹ <https://unpaiddebt.org/sudanese-churches-encouraged-by-lundin-trial/>.

¹⁰ <https://swedwatch.org/region/africa-south-of-the-sahara/investors-fail-to-act-on-allegations-against-lundin-petroleum/>

¹¹ In 2011, the area became part of the newly independent country South Sudan. We refer to it as belonging to South Sudan, also before 2011.

Between 1997 and 2003, international crimes were committed on a large scale in what was essentially a military campaign by the Government of Sudan to secure and take control of the oil fields in Block 5A. They allegedly included

- systematic and deliberate attacks on civilians,
- unlawful killing of civilians,
- wanton destruction of civilian properties,
- abduction of civilians with intent to coerce them into service (slavery),
- pillage,
- deliberate destruction of objects necessary for survival,
- use of hunger as a weapon of war,
- use of underage children to participate actively in hostilities,
- rape of women, and
- forced displacement.

These and other gross and systematic human rights violations and the role of the oil industry in their commission were documented and publicly reported at the time by multiple experts, and human rights bodies, both governmental and non-governmental.¹² By 2003, Block 5A was devastated and deeply impoverished. 160.000 people were violently displaced and an estimated 12.000 people died.¹³

It is the Complainants' submission that Lundin Energy contributed to gross and systematic human rights violations. This position is supported by the Swedish Prosecution Authority. On 11 November 2021 two Lundin Energy executives, Chairman Ian Lundin and Director and former CEO Alex Schneiter, were indicted for complicity in grave war crimes.¹⁴ By their nature, these crimes inflict severe material damage and harm people. The charges relate entirely to the suspects' actions as executives of Lundin Energy.¹⁵ The Swedish prosecutor alleges that Lundin Energy requested the Sudanese government to secure their operations, knowing that this would mean seizing areas by force and without due regard for international law, making the executives complicit in the war crimes that were consequently committed against civilians.¹⁶ The prosecutor has furthermore announced that it will request the court to declare Lundin's operation in South Sudan a criminal enterprise and to forfeit all benefits.¹⁷

¹² E.g. John Harker et al., prepared for the Department of Foreign Affairs and International Trade, 'Human Security in Sudan: The Report of a Canadian Assessment Mission', 2000.

Leonardo Franco, Commission on Human Rights, Fifty-sixth session, E/CN.4/2000/36, 'Situation of human rights in the Sudan', April 2000.

Amnesty International, 'Sudan: The Human Price of Oil', 2000.

Christian Aid, 'The scorched earth. Oil and war in Sudan', 2001.

Georgette Gagnon and John Ryle, 'Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan', 2001.

Diane deGuzman, ed. by E. G.Ch. Wesselinck, for the European Coalition on Oil in Sudan, 'Depopulating Sudan's oil regions', 2002.

Human Rights Watch, 'Sudan, Oil and Human Rights', 2003.

¹³ European Coalition on Oil in Sudan, 'Unpaid Debt, The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan 1997-2003', 2010, p. 51-65.

¹⁴ <https://www.aklagare.se/en/media/press-releases/2021/november/prosecution-for-complicity-in-grave-war-crimes-in-sudan/>

¹⁵ <https://www.lundinsudanlegalcase.com/company-statements/board-response-2021/>.

¹⁶ Reuters, 'Sweden charges Lundin Energy executives with complicity in Sudan war crimes', 11 November 2021, <https://www.reuters.com/world/africa/sweden-charges-lundin-energy-executives-complicity-sudan-war-crimes-2021-11-11/>

¹⁷ Swedish Prosecution Authority.

Lundin Energy's Norwegian assets are directly linked to the company's alleged criminal activities. According to Lundin Energy's third quarter financial report from 2003, the profit derived from the sales of its Sudan operations enabled the purchase of assets on the Norwegian Continental Shelf, which marked the start of Lundin Energy's operations in Norway.¹⁸

South Sudanese victims of human rights violations publicly claim their right to remedy and reparation since 2016.¹⁹ However, they did not receive a response from Lundin Energy to this day. Their hope is that the facts presented at the trial will oblige the company to comply with the OECD Guidelines and address its unaddressed adverse impacts.

On 21 December 2021, Lundin Energy announced a statutory merger with Aker BP, whereby Aker BP will acquire Lundin Energy's core assets, its Norwegian exploration and production business. Aker ASA is the main investor in Aker BP.²⁰ The merger plan estimates the current value of Lundin Energy at app. MUSD 11,000 and foresees a dramatic reduction in net asset value to app. MUSD 300. Nevertheless, Lundin Energy will continue to bear all costs and retain all liabilities related to the war crimes indictment and its underlying circumstances.²¹ The merger plan allows Lundin Energy to pay the requested forfeiture of criminal benefits but deprives the company of the means necessary to cover the costs of addressing actual, ongoing (unremediated) impact.

Aker ASA exercises a high degree of effective control over Aker BP. Aker ASA holds 37.14% of the shares and occupies three seats in its Board of Directors, including the Chairmanship, who doubles as the Chair of Aker ASA itself. Aker ASA was a key driver of and played a central role in the conclusion of the statutory merger between Lundin Energy and Aker BP.²²

The shareholders of Aker BP, including Aker ASA, approved the merger agreement on 5 April 2022. On 2 May 2022, it was announced that the merger had received the necessary Norwegian Government approvals. The completion of the merger is expected to take place on 30 June 2022.²³

2.3. Whether the issue is material and substantiated

The Complainants allege that Aker ASA has contravened its responsibilities under the OECD Guidelines in three key respects.

¹⁸ See e.g., Lundin Petroleum, Q3 Report (2003), p. 2, https://www.lundin-energy.com/download/qr_3_2003_e/?wpdmdl=5060&refresh=61e9f7d241ae51642723282/

¹⁹ See <https://unpaiddebt.org/remedy-claim/>

²⁰ <https://www.lundin-energy.com/download/creating-the-leading-ep-company-of-the-future-combining-akerbp-and-lundin-energy-regulatory/?wpdmdl=38944&refresh=62704ff9359551651527673/>

²¹ Lundin Energy, Year End Report (2021), https://www.lundin-energy.com/download/year-end-report-2021/?ind=1643650396637&filename=qr_4_2021_e.pdf&wpdmdl=39087

²² [Dagens Næringsliv](#), På innsiden av Aker-duoens største deal: Røkke og Eriksen dro grytidlig med privatfly til Lundin-frokostmøte i Sveits, 23 December 2021.

²³ <https://akerbp.com/en/borsmelding/receipt-of-governmental-approvals-for-the-contemplated-merger-with-lundin-energys-ep-business-2/>

2.3.1. Inadequate human rights due diligence

Chapter II (General Policies), OECD Guidelines provides that MNEs should:

“10. **Carry out risk-based due diligence**, for example by incorporating it into their enterprise risk management systems, to **identify, prevent and mitigate actual and potential adverse impacts** [...] and **account for how these impacts are addressed**.

...

12. **Seek to prevent or mitigate an adverse impact** where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.” [Emphasis added]

Chapter IV (Human Rights), OECD Guidelines provides that MNEs should:

“1. **Respect human rights**, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

...

5. **Carry out human rights due diligence** as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.”

6. Provide 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.” [Emphasis added]

The human rights allegations against Aker ASA’s business partner Lundin Energy and the estimated scale of Lundin Energy’s adverse impacts are extraordinary severe.²⁴ Assertions that Lundin Energy has ongoing (unremediated) adverse impacts are common knowledge of which Aker ASA should have been aware when the merger with Aker BP was proposed. Aker ASA should consequently have identified the human rights risks associated with its investee company’s merger proposal. According to the above provisions of the OECD Guidelines, Aker ASA should have carried out risk-based human rights due diligence (‘HRDD’) on the merger between Aker BP and Lundin Energy to identify, prevent and mitigate its actual and potential adverse impacts.

The Complainants are not aware of HRDD on the merger by Aker ASA. Neither does Lundin Energy refer to due diligence on the merger.²⁵ This is particularly problematic as Aker BP does not appear to have carried out HRDD either. The full Merger plan of 14 February 2022 contains no references to HRDD.²⁶ Aker BP’s press release announcing the merger referred to “customary limited due diligence

²⁴ <https://unpaiddebt.org/resources/documentation/>. See also Nationella Åklagarmyndigheten, ‘MEDHJÄLP TILL FOLKRÄTTSBROTT, GROVT BROTT (Lundin och Schneider) (0104-K48-10)’, Case AM-35463-10, Stockholm, 11 November 2021.

²⁵ <https://www.lundin-energy.com/download/creating-the-leading-ep-company-of-the-future-combining-akerbp-and-lundin-energy-regulatory/?wpdmdl=38944&refresh=627119b4c6a381651579316/>, and <https://www.lundin-energy.com>.

²⁶ <https://akerbp.com/en/borsmelding/merger-plan-signed-with-lundin-energy-2/>, and <https://www.lundin-energy.com/download/akerbp-merger-plan/#>.

investigations of a confirmatory nature of certain business-related, financial and legal information regarding Aker BP and Lundin Energy”, but not to any *human rights* due diligence.²⁷ Importantly, customary corporate due diligence is not the same thing as the corporate responsibility to conduct human rights due diligence.

A relationship between an investor and investee company including a minority shareholding can be considered a business relationship under the OECD Guidelines.²⁸ Therefore, there can be a direct link between an investor and adverse impacts caused or contributed to by companies in their portfolio. Investors are therefore expected to identify, prevent and mitigate actual and potential adverse impacts of investee companies, and to use their leverage to influence investee companies to prevent, mitigate or address adverse impacts.²⁹ They should not endorse or cooperate in failure by investee companies to comply with the OECD Guidelines.

Aker ASA exercises a controlling ownership over Aker BP. As major investor in Aker BP, occupying three seats in its Board of Directors including the Chair, who also serves as President and CEO of Aker ASA. Decisive negotiations that concluded the merger were conducted between Ian Lundin on the one hand and the majority owner of Aker ASA, Mr Kjell Inge Røkke and the CEO of Aker ASA, Mr Øyvind Eriksen, on the other hand.³⁰ Therefore, Aker ASA has the responsibility to see to it that Aker BP is in compliance with the OECD Guidelines and conducts HRDD on all of its business relationships. As Lundin Energy has repeatedly rejected proposals to conduct HRDD and assess its human rights impacts³¹, Aker ASA should realize that one cannot rely on information from Lundin Energy and should have paid due concern to the fact that Aker BP’s business partner has consistently failed to assess and address its impacts.³²

Under the OECD Guidelines an enterprise causes or contributes an adverse impact if there is direct connection between the actions or failure to act of an enterprise and the adverse impact. “[C]ontributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions.”³³ Aker ASA has failed to carry out HRDD on Aker BP’s merger with Lundin Energy. Complainants contend that a HRDD on the merger would have identified that it facilitates significant adverse impacts by perpetuating ongoing (unremediated) impacts. (see 2.3.3).

²⁷ Aker, ‘Aker ASA and Lundin Energy combine their oil and gas businesses’, press release, 21 December 2021.

²⁸ See “Scope and applications of ‘business relationships’ in the financial sector under the OECD Guidelines for Multinational Enterprises”. This interpretation has been supported by experts on the OECD Guidelines and UNGPs who have reached the same conclusions. See “Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector”, 2014. These papers are available at <http://mneguidelines.oecd.org/rbc-financial-sector.htm>.

²⁹ <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>, p. 13.

³⁰ [Dagens Næringsliv](#), På innsiden av Aker-duoens største deal: Røkke og Eriksen dro grytidlig med privatfly til Lundin-frokostmøte i Sveits, 23 December 2021.

³¹ <https://www.lundinsudanlegalcase.com/company-statements/>.

³² https://www.lundin-energy.com/download/ot_agm_12_board_share_resp_e/?wpdmdl=6520/, and https://www.lundin-energy.com/download/ot_agm_13_board_share_resp_e/?wpdmdl=6499/

³³ OECD, ‘OECD Guidelines for Multinational Enterprises’, 2011, Chapter II, Commentary on General Policies, paragraph 14.

Complainants submit that Aker ASA wields significant managerial control over Aker BP. Aker ASA was actively involved in negotiating and concluding the merger agreement, and directed and influenced Aker BP to sign an agreement which facilitates, incentivises and rewards Lundin Energy to cause severe adverse impacts.

In instances where an investor ‘causes’ or ‘contributes’ to an adverse impact covered by the OECD Guidelines, the investor is expected to address the impact through remediation and account for how it is addressed.³⁴ Consequently, Aker ASA has a responsibility under the OECD Guidelines to ensure that Aker BP will provide for or co-operate through legitimate processes in the remediation of these adverse human rights impacts.

Aker ASA’s failure to use its considerable leverage with Aker BP to carry out HRDD on the merger constitutes a failure to comply with the OECD Guidelines.

Aker ASA’s omission to carry out HRDD on the merger between Aker BP and Lundin Energy and identify, prevent or mitigate its actual and potential adverse impacts constitutes a failure to comply with the OECD Guidelines.

2.3.2. Failure to meaningfully engage with stakeholders

Chapter II (General Policies), OECD Guidelines states that MNEs should:

“14. Engage with relevant stakeholders in order to provide **meaningful opportunities** for their views to be taken into account in relation to planning and **decision making** for projects or other activities that may **significantly impact local communities**.” [Emphasis added]

The OECD Guidelines elaborate that ‘stakeholder engagement’ might be “particularly helpful in the planning and decision-making concerning projects or other activities [...] which could significantly affect local communities.”³⁵

Neither the Complainants, nor any representatives of affected communities were made aware of the proposed merger prior to its announcement on 21 December 2021. During the conference call to present the merger, co-hosted by Aker BP and Lundin Energy, PAX expressed the concern that the merger would be at odds with Aker BP’s human rights commitments as it would deny victims of human rights violations access to remedy. In response, Nick Walker, CEO of Lundin Energy, denied that there was a viable legal case in Sweden, and the President and CEO of Aker ASA, Øyvind Eriksen, stated that the acquired assets have no relationship with ‘the Sudan matter’.

Subsequently, Norwegian People’s Aid, Norwegian Church Aid and PAX sought to engage in a substantial dialogue with Aker BP about human rights. This was accepted and a first meeting between Aker BP on the one hand and NPA and PAX on the other, was held on 27 January 2022. NPA and PAX shared the concern that the merger was in breach of the OECD Guidelines because no HRDD had been carried out and stakeholders had not been consulted. They argued that the merger will deny South Sudanese

³⁴ OECD, 2017, ‘Responsible business conduct for institutional investors, Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises’, p. 45.

³⁵ OECD Guidelines, II. General Policies, Commentary on General Policies, paragraph 25.

victims of human rights violations access to remedy and reparation, perpetuating ongoing (unremediated) impacts. Aker BP's CEO Karl Johnny Hersvik acknowledged that the victims' perspective was new to the company, but asserted that there was no human rights issue because Lundin Energy's assets had nothing to do with its Sudanese legacy. He showed no interest to engage with affected communities in South Sudan.

A second discussion was held on 22 March 2022 between NPA and representatives of both Aker ASA and Aker BP. They claimed that their due diligence responsibilities had been fulfilled by Aker BP's commissioning of a Swedish law firm to carry out due diligence on the merger. They acknowledged that no specific HRDD had been carried out on the merger and that Lundin Energy's human rights legacy had not been examined. Nevertheless, they asserted that the merger will have no adverse human rights consequences because Lundin Energy will carry all liabilities and costs related to its Sudanese legacy. Aker ASA rejected the proposal to work towards amending the merger agreement. During the dialogue, Aker ASA's failed to meaningfully address the presented human rights concerns.

The Complainants argue that, under the agreed terms, the merger will significantly impact victims of human rights violations as they can no longer access remedy. To date, neither Aker ASA, nor its investee Aker BP have engaged with the most relevant stakeholders, the significantly impacted local communities.

Aker ASA's failure to engage meaningfully and timely with relevant stakeholders constitutes a failure to comply with the OECD Guidelines.

2.3.3. Substantial contribution to facilitation of ongoing (unremediated) impacts

Chapter IV (Human Rights), OECD Guidelines relevantly provides that enterprises should:

3. "Seek ways to **prevent or mitigate adverse human rights impacts** that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts."

Based on the available contemporary reports³⁶, expert opinions³⁷, and the evidence and conclusions of the Swedish Prosecution Authority³⁸, it is the Complainants' submission that Lundin Energy contributed to gross and systematic human rights violations that caused severe harm to people and property, has not assessed and addressed its human rights impacts, and has severe ongoing (unremediated) impacts to address.³⁹

The merger will dramatically reduce the net asset value of Lundin Energy to app. USD 300 million.⁴⁰ In addition, the Swedish prosecutor will request the Court to declare an amount of SEK 1,391 million

³⁶ See: <https://unpaiddebt.org/resources/documentation>.

³⁷ Idem.

³⁸ The criminal investigation file and all filings in the case are publicly accessible and can be requested from the Stockholm District Court @ <https://www.domstol.se/stockholms-tingsratt/>.

³⁹ <https://www.lundinsudanlegalcase.com/company-statements/shareholder-proposals-2012/>

⁴⁰ https://www.lundin-energy.com/download/year-end-report-2021/?ind=1643650396637&filename=qr_4_2021_e.pdf&wpdmdl=39087.

forfeited from Lundin Energy and impose a corporate fine of SEK 3 million, a combined total of USD 150 million in financial liabilities. Lundin Energy will make no provisions for the costs of the forfeiture or any other costs related to the indictment, a fact that Aker ASA should be aware of.⁴¹ The damages caused by the human rights violations in Block 5A between 1997 and 2003 are estimated at USD 1.787 million.⁴² Complainants contend that it is a foreseeable result of Aker BP's acquisition that Lundin Energy's actual adverse human rights impacts will remain unaddressed.

Significantly, pursuant to the terms of the Transaction Agreement between Lundin Energy and Aker BP, which formalises the acquisition, Aker BP will receive Lundin Energy's oil and gas assets and Lundin Energy will "indemnify [Aker BP] against losses, liabilities, costs or expenses, arising or incurred as a result of the underlying facts and circumstances relating to the [Swedish prosecutor's] Indictment, including both criminal claims and civil claims, and including the costs of handling such claims, incurred by or being made against any member of the Target group [Lundin Energy] (including any successor entity) prior to or after the completion of the Merger."⁴³ Lundin Energy will make no provisions for the costs of the forfeiture or any other costs related to the indictment.⁴⁴ In other words, after the transfer of its most valuable assets to Aker BP, Lundin Energy will remain solely and fully liable for any harm that it may have contributed to in South Sudan.

The Complaints notice that both the timing and the terms of the acquisition suggest that it is Lundin Energy's intention to, at least partly, escape the costs of addressing adverse impacts.⁴⁵ They contend that this should not have escaped the attention of Aker ASA.

The existence of potential or actual impacts in an investor's portfolio means there is a direct linkage through this business relationship with the investee company.⁴⁶ As a result, investors are expected to consider human rights risks throughout their investment process and to use their leverage with companies they invest in to influence those investee companies to prevent or mitigate adverse impacts.⁴⁷ Aker ASA's ownership of Aker BP creates a direct linkage with the latter's human rights conduct, and hence creates a direct link between Aker ASA and Lundin Energy's foreseeable negligence regarding its impacts. If Aker ASA had conducted adequate HRDD, in the Complainants' opinion, such would have revealed severe ongoing (unremediated) impacts of Lundin Energy. It would also have found that the acquisition will result in their perpetuation, in which case Aker ASA would have been expected to use its leverage to prevent the identified human rights risk.

In case of direct linkage to adverse impacts, the use of leverage can be critical to compliance with the OECD Guidelines. "Meeting the expectation in paragraph 3 would entail an enterprise ... to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that

⁴¹ Idem

⁴² <https://unpaiddebt.org/calculating-the-debt/>. A precise calculation will require a comprehensive assessment by independent experts.

⁴³ Aker, 'Aker ASA and Lundin Energy combine their oil and gas businesses', press release, 21 December 2021.

⁴⁴ Idem

⁴⁵ Aker, 'Aker BP and Lundin Energy combine their oil and gas businesses', press release, 21 December 2021.

⁴⁶ OECD, 2017, 'Responsible business conduct for institutional investors, Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises', p. 13.

⁴⁷ Idem.

impact ... ”⁴⁸ Aker ASA’s failure to use its leverage over Aker BP to prevent adverse human rights impacts constitutes a failure to comply with the OECD Guidelines.

Aker ASA’s substantial contribution to Aker BP’s rejection of any responsibility for the merger’s human rights impacts, through its facilitation and active support for an arrangement that disables Lundin Energy to address adverse impacts, constitutes facilitation of severe ongoing (unremediated) impacts and a failure to comply with the OECD Guidelines

3. Whether there seems to be a link between Aker ASA’s activities and the issues raised in the specific instance

Between 1997 and 2003, the Sudanese military and armed militia committed (‘caused’) severe human rights violations in and around Block 5A that by their nature, severely harms people and damages civilian property. It is the Complainants’ submission that Lundin Energy contributed to these violations.

Under the OECD Guidelines, companies causing and contributing to adverse impacts must identify and address their human rights impacts and remediate adversely affected people. Lundin Energy has neither identified nor addressed its human rights impacts in South Sudan.

As noted above, according to the press release announcing the acquisition, Lundin Energy’s oil and gas assets will be transferred to Aker BP through a statutory merger with a single purpose company that will receive the assets from Lundin Energy. Lundin Energy will continue to carry all costs and other consequences related to the indictment. After the merger, the responsibility to remediate victims will lie with Lundin Energy – a company that at that point will no longer have sufficient means to fulfil this responsibility.

In the Complainants’ view, Aker ASA is directly linked to Lundin Energy’s inability to address severe ongoing (unremediated) impact through the proposed merger of its investee company Aker BP. According to the OECD Guidelines, ‘linkage’ is defined by the relationship between the adverse impacts and the MNE’s products, services or *operations* through another entity (a ‘business relationship’).⁴⁹ Aker ASA is directly linked to Aker BP through ownership and influence. There is also a direct relationship between Aker ASA and the merger because Aker ASA is the predominant shareholder in Aker BP, wielding significant managerial control over the enterprise, who critically contributed to the merger negotiations. Without Aker ASA’s leadership and influence, the merger would not have been concluded. In addition, Aker ASA has preemptively obstructed efforts to make the merger compliant with the OECD Guidelines by irrevocably committing to voting in favor of the proposal prior to its announcement on 21 December 2021.

In the Complainants’ view, Aker ASA is directly linked to the merger between Aker BP and Lundin Energy through its substantial contribution, and is hence directly linked to Lundin Energy’s consequent and foreseeable failure to remediate its adverse impacts. According to the terms of the merger agreement,

⁴⁸ OECD Guidelines, IV. Human Rights, Commentary on Human Rights, paragraph 43.

⁴⁹ OECD Guidance, Q29, page 71.

Lundin Energy's net asset value will be dramatically reduced while Lundin Energy will retain all liabilities and cover all costs that are related to the Swedish indictment for complicity in grave war crimes. The legal responsibility to remediate post-merger will lie with Lundin Energy – an enterprise that at that point will have insufficient means to carry this responsibility.

Aker ASA has failed to use its decisive leverage with Aker BP to carry out HRDD on the merger to prevent or mitigate the adverse human rights impacts of the merger. Aker ASA substantially contributed to Aker BP's merger with Lundin Energy, and hence to the adverse impact that the merger causes. Aker ASA facilitated and incentivized its investee company Aker BP to act in a way that will inevitably result in the foreseeable failure by Lundin Energy to address severe ongoing (unremediated) impact.

4. The relevance of applicable law and procedures, including court rulings

Complainants are not aware of relevant applicable law and procedures.

5. How similar issues have been, or are being, treated in other domestic or international proceedings

The Complainants submit that consideration of the OECD complaint will not prejudice Swedish court proceedings given that the questions of Swedish criminal law at issue are materially distinct from the provisions in the Guidelines.

The Swedish indictment includes a request for forfeiture of criminal benefits from Lundin Energy. The forfeiture procedure is part of Swedish criminal law and is not related to Lundin Energy's responsibility to address adverse impacts. Forfeited criminal revenues are collected by the Ministry of Finance and are not earmarked to benefit victims of crimes. The 32 victims of grave war crimes who will be represented in court will bring individual compensation and reparation claims. However, another 200.000+ South Sudanese victims have no legal recourse. This makes it all the more paramount that Aker ASA prevents that Lundin Energy becomes incapacitated to address ongoing (unremediated) impacts.

6. Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

This complaint contributes to the purposes and effectiveness of the Guidelines. It concerns MNE responsibilities outlined in the Guidelines and MNE connections (direct linkage and contribution) to severe adverse human rights impacts caused by another entity. Facilitated dialogue by the NCP between

the parties to the complaint, with the aim of ensuring that Aker ASA complies with the principles and standards of the OECD Guidelines, would be especially useful for the resolution of the issues raised in this complaint.

The consideration of this complaint may further help clarify several important dimensions of the OECD Guidelines. 1) The responsibility of influential investor companies over decisions by investees that creates a foreseeable risk that business partners will fail to address severe actual adverse impacts. 2) The responsibility of companies over substantial contribution to the risk of perpetuation of ongoing (unremediated) impact in case of a failure by a business partner to assess and address its human rights impacts. And 3) Consideration of this case offers a unique opportunity to inform Aker ASA about its responsibilities in these regards under international standards.

If the NCP decides that the issues raised merit further examination and offers its good offices to the parties, the Complainants would seek the following outcomes through this process:

1. Suspension of the taking of effect of the merger between Aker BP and Lundin Energy until such a time as Aker ASA carries out comprehensive risk-based HRDD on the merger in accordance with the OECD Guidelines.
2. For Aker ASA to carry out comprehensive risk-based HRDD on the Aker BP's acquisition of Lundin Energy's assets, including an assessment of the company's alleged ongoing (unremediated) impacts.
3. For Aker ASA to meaningfully engage with all relevant stakeholders of Aker BP's acquisition of Lundin Energy's assets, including significantly impacted local communities.
4. For Aker ASA to take all necessary measures to ensure that the merger agreement between Aker BP and Lundin Energy will be amended in order to achieve that Lundin Energy retains sufficient financial means to provide effective remedy to victims of the human rights violations that the company stands credibly accused of having contributed to.
5. If the amendment of the merger agreement above proves to be unfeasible, for Aker ASA to take all necessary measures to ensure that victims of adverse impacts in South Sudan access their right to effective remedy and reparation, including if this means that Aker ASA itself will contribute to the provision of effective remedy.

7. Conclusion and recommendations

In conclusion, Complainants contend that Aker ASA's conduct regarding the statutory merger between Aker BP and Lundin Energy has not been in compliance with the OECD Guidelines in three main respects 1) inadequate due diligence, 2) inadequate engagement with stakeholders, and 3) substantial contribution to the facilitation of ongoing (unremediated) impacts.

Considering that a merger between Aker BP and Lundin Energy will take effect before the end of June 2022, the Complainants respectfully request for the Norwegian NCP to expedite this complaint and to swiftly conduct its initial assessment.

If the NCP determines that the issues raised merit further examination, the NCP is encouraged to promptly offer good offices to the parties with a view to the resolution of the issues raised in the complaint.

Complainants encourages the NCP, after reception of this complaint, to promptly inform the competent Norwegian authorities about the complaint and about the Complainants' position that the merger between Aker BP and Lundin Energy fails to comply with the Norwegian policies and objectives regarding business and human rights.

Complainants furthermore recommends the NCP, after reception of this complaint, to call for the competent Norwegian authorities to explain how the expectations set forth in the OECD Guidelines have been considered when granting permission for the merger between Aker BP and Lundin Energy.

Complainants finally encourages the NCP, after reception of this complaint, to call for the competent Norwegian authorities to take all necessary measures to ensure that the statutory merger between Aker BP and Lundin Energy complies with the OECD Guidelines.