

Fornebu, 24 June 2022

## Response to the NCP on behalf of Aker ASA and Aker BP ASA

We refer to the complaints against Aker BP ASA (“Aker BP”) and Aker ASA dated 31 May 2022 (the “Complaints”) related to the merger transaction between Aker BP and Lundin Energy AB (“Lundin Energy”), and to the NCP’s email of 10 June 2022. We thank you for the opportunity to provide our comments in connection with the NCP’s initial assessment of whether or not the case merits further consideration.

### 1 Introduction

Separate, almost identical complaints have been filed against Aker BP and Aker ASA. For practical purposes we believe the two complaints would be best handled together for the initial assessment. The underlying issues raised are to a large extent the same, but the complaint against Aker ASA is based on its position of being an investor in Aker BP, while the complaint against Aker BP is based on the position of being a direct party to the transaction with Lundin Energy.

We hereby submit our comments on behalf of Aker BP and Aker ASA on the points relevant to the initial assessment.

Aker BP and Aker ASA have a strong commitment to respect human rights and have implemented the OECD Guidelines for Multinational Enterprises (the “Guidelines”) in our governing documents. We respect and support the important function of the NCP in Norway and will fully cooperate in the NCP process. Yet, we believe that the Complaints are not suited for further consideration as a specific instance. The Complaints do not concern actual or potential adverse impacts on human rights, but rather the lack of remedy for alleged human rights violations that have long ceased, and that were not linked to any of the companies now acquired by Aker BP.

Aker and Aker BP have, prior to receiving the Complaints, been contacted by some of the complainants and engaged in dialogue with participation of the CEO of Aker BP and other senior representatives. Aker and Aker BP are committed to engage in and continue dialogues with parties affected by our business, and we fully respect the important function of the organisations working to promote the interests protected by the Guidelines.

The complaints concern alleged non-compliance with the Guidelines in relation to the merger transaction between Aker BP and Lundin Energy, regarding Chapter II (General Policies) and Chapter IV (Human Rights). The Complaints contend that Aker BP (i) failed to conduct human rights due diligence (“HRDD”) in connection with the merger; (ii) failed to meaningfully engage with stakeholders; and (iii) (thereby) facilitated ongoing (unremedied) adverse impact as the transaction leaves Lundin Energy with insufficient means to provide remedy to victims. It is alleged that Aker BP, through the merger transaction with Lundin Energy, will contribute to a *foreseeable future failure* by Lundin Energy to provide remedy to victims of human rights violations in Sudan to which Lundin Energy stands accused of having contributed.

The Complaints are addressing a set of facts that relate to Lundin Energy's alleged obligation to provide remedy for past activities, but Lundin Energy is not a party to the Complaints. The underlying issue of whether Lundin Energy did in fact contribute to human rights violations perpetrated by the government army and government-backed militia groups during a civil war, is rejected by Lundin Energy and is currently subject to criminal proceeding in Sweden<sup>1</sup>.

We submit that the Complaints do not meet the admission criteria of the Initial Assessment. We also deem any examination of the issues covered in the Complaints under the NCP procedure without Lundin Energy's participation, while the underlying issues are litigated against Lundin Energy in a Swedish court, as problematic. We therefore respectfully submit that the Complaints do not merit further consideration by the NCP and that they should be rejected. We outline the reasons for this below, after providing some background information on the transaction and our risk assessment with respect to human rights.

## 2 Background

Aker BP's commitment to respect human rights is set out in Aker BP's human rights policy<sup>2</sup>, which incorporates human rights due diligence. It states that:

- *We will continuously assess human rights impacts from our operations by performing human rights due diligence and propose necessary preventive risk mitigating actions if needed*
- *We offer a system for raising concerns in situations when our operations have or can potentially affect human rights of individuals, workers and local communities*
- *We will provide or cooperate in providing appropriate remediation to individuals, workers and local communities, where we have caused or contributed to adverse human rights. To such effect, we will also, where relevant, provide or cooperate in effective grievance mechanisms*
- *We will conduct risk assessment and audits of our suppliers and business partners to assess where the risk of human rights infringements is highest in order to continuously improve our efforts to mitigate human rights violations.*

Aker ASA is committed to respect human rights and ensure that companies in its investment portfolio respect human rights in the countries in which the portfolio companies operate. Aker ASA's Sustainability Policy<sup>3</sup> incorporates the Guidelines and other recognised international standards on human rights.

The scope of an adequate human rights due diligence under the Guidelines is determined using a risk-based approach and considering what is proportionate and reasonable based on the context. Through the merger transaction, Lundin Energy will divest its Norwegian oil and gas business while retaining the following assets and liabilities: (i) the renewables business, (ii) USD 130 million of cash at closing, and (iii) the liabilities and obligations associated with the Sudan case. Lundin Energy will continue, under the new name Orrön Energy AB, as a listed company on the Nasdaq Stockholm stock exchange, with a business plan to develop the renewables business further. Accordingly, Lundin Energy will continue to own and operate a substantial business after the completion of the transaction.

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<sup>1</sup> Two former representatives of Lundin Energy have been indicted. Although legal persons cannot be held criminally liable under Swedish criminal law, Lundin Energy is also a defendant in these proceedings in relation to actions initiated by the prosecutor for confiscation of alleged financial advantage resulting from alleged offences committed in the exercise of its business activities and for imposing of corporate fines.

<sup>2</sup> <https://akerbp.com/wp-content/uploads/2022/04/human-rights-policy-principles.pdf>, available on our website <https://akerbp.com/en/policy-hub/>.

<sup>3</sup> [Sustainability-Policy-2022 2022-02-21-091415 cepp.pdf \(ams3.cdn.digitaloceanspaces.com\)](https://akerbp.com/wp-content/uploads/2022/02/2022-02-21-091415_cepp.pdf)

The allegations related to Lundin Energy's former operations in Sudan are well-known, and our due diligence process included an assessment of whether the companies being acquired could be linked to the alleged adverse impacts. It was found that none of the companies Aker BP would acquire from Lundin Energy had been involved in any activities or operations in Sudan and that Lundin Energy Norway AS had been acquired by Lundin Energy after the operations in Sudan had ended. It was also confirmed that the transaction does not limit or reduce any potential liability and responsibilities of Lundin Energy for past activities in Sudan and that Lundin Energy would retain significant assets after the transaction.

The criminal case in Sweden is highly complex, and we noted that the main hearing in the District Court was expected to last for more than two years; that the Prosecutor's initial case file comprised around 80 000 pages; and that the charges were also largely based on witness accounts<sup>4</sup>. All the defendants, including Lundin Energy, strongly deny the charges and will contest them at trial<sup>5</sup>. It would not have been possible to conduct a detailed review of a complex set of facts that is currently subject to lengthy litigation.

Lundin Energy has been a member of Global Compact since 2010 and endorsed the UN Guiding Principles on Business and Human Rights ("the UNGP") in 2012. The company's commitment to comply with the UNGP and OECD Guidelines is stated in their policy documents and confirmed by the board. Lundin Energy's policies and commitments were reviewed and considered as part of our compliance due diligence. Lundin Energy is a listed company, and the board of Lundin Energy would need to make necessary assessments of the financial situation, including potential liabilities, before any part of the proceeds from the transaction could be distributed to the Lundin Energy shareholders.

### 3 Formal criteria for the Initial Assessment

The criteria to be considered as part of the Initial Assessment include review of formal aspects as well as more substantial issues. We comment first on the formal aspects.

We accept, bona fide, that the Complainants have a legitimate interest in the issues raised.

The Complaints name Aker BP and Aker ASA as sole defendants and that the Norwegian NCP would be the correct entity to assess our role in the merger transaction between Aker BP and Lundin Energy. It should nevertheless be noted that the underlying issue of the matter concerns the potential responsibility of a Swedish company to remedy victims of human rights violations that ceased two decades ago. As the matter is first and foremost related to the alleged obligation to provide remedy for a Swedish multinational enterprise, it would seem natural that a complaint should be brought against Lundin Energy before the Swedish NCP.

To our knowledge, neither the Complainants nor any other party has at any time brought a complaint against Lundin Energy before the Swedish NCP for non-compliance with the Guidelines. Lundin Energy was an early adopter of the UNGP in 2012, yet the Complainants have chosen not to bring a complaint against Lundin Energy for its alleged breaches of the Guidelines. Nor have they at any time brought a complaint against the institutional investors in Lundin Energy, such as government pension funds and major banks and capital funds, despite publicly calling out their alleged failure to live up to

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<sup>4</sup> <https://www.aklagare.se/nyheter-press/pressmeddelanden/2021/november/atal-for-medhjalp-till-folkrattsbrott-grovt-brott-i-sudan/>

<sup>5</sup> The company's position is set out in <https://www.lundinsudanlegalcase.com/wp-content/uploads/2021/11/Lundin-Energy-AB-counsels-statement-2021-11-12.pdf>

the expectations on responsible investments<sup>6</sup>. We are also not aware of complaints against OMV and the other license partners who participated in the same joint venture as Lundin Energy in Sudan. They instead request the Norwegian NCP to consider these very serious allegations against Lundin Energy in a specific instance procedure with Aker BP and Aker ASA, as investor in Aker BP, and to facilitate dialogue and mediation about these issues in the absence of Lundin Energy.

#### 4 Whether the complaints concern an issue covered by the Guidelines

For the Complaints to merit further examination, the case must be material and concern an issue covered by the Guidelines. Chapter IV of the Guidelines call on enterprises to avoid causing or contributing to adverse human rights impacts within the context of their own activities and address (remedy) such impacts when they occur. Enterprises are also expected to seek ways to prevent or mitigate (but not remedy) adverse human rights impacts that they are directly linked to by a business relationship, even if they do not contribute to those impacts. The Guidelines (chapter II, para 12) clearly state that the duty to seek to prevent or mitigate adverse impact caused or contributed to by a business relationship, is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship. Yet, this is precisely what the Complainants seek to do:

*Aker BP's rejection of any accountability for Lundin Energy's ongoing (unremediated) impacts, while concluding an agreement that disables Lundin Energy to address such impacts, constitutes facilitation of ongoing (unremediated) impacts and a failure to comply with the OECD Guidelines.*

The Complaints do not contend that Aker BP has caused or contributed to the adverse impacts that people of South Sudan suffered during the period 1999-2003 when there was a civil war. In an attempt to build a case that Aker BP is somehow linked to an actual adverse impact, the Complaints use the term “*ongoing (unremediated) adverse impact*” in relation to human rights violations that ceased two decades ago. Without further discussion, the Complaints assume that lack of remedy for past violations in and of itself constitutes an ongoing human rights violation (of great severity). We submit that this is not the case. The Guidelines call on multinational enterprises to seek to prevent or mitigate any *actual* or *potential* adverse impacts. Hence, we submit, the allegations set forth in the Complaints do not in fact concern an issue covered by the Guidelines.

#### 5 Whether the Complaints are substantiated

In accordance with the Procedural Rules the Complainants are required to substantiate the case with facts as far as possible and include copies of documents/ first-hand accounts rather than describing such documents. We note that many of the references in the Complaints link to the website [www.unpaiddebt.org](http://www.unpaiddebt.org), which is operated by PAX, without providing much detail of any underlying documentation. The Complaints are based on the factual premise that the merger agreement deprives Lundin Energy of the means necessary to provide remedy to victims of human rights violations during the period 1999-2003 in (then) Sudan. An examination of the matter under the specific instance procedure would evolve around factual questions regarding the value of the remaining business in Lundin Energy after the transaction and the cost of providing remedy and reparation proportional with Lundin Energy's alleged role in the human rights violations. We cannot see that the Complainants have documented or otherwise substantiated their assertions.

The Complaints suggest that the indictment itself should be taken as substantiation that Lundin Energy has contributed to human rights violations (“they stand credibly accused”). The factual

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<sup>6</sup> <https://swedwatch.org/region/africa-south-of-the-sahara/investors-fail-to-act-on-allegations-against-lundin-petroleum/>

allegations of whether or to what extent Lundin Energy has contributed to human rights violations, will be determined by the court in accordance with the principles of due process. It could perhaps be argued that the Complaints merely concern the alleged financial inability of Lundin Energy to address remedy if and when the company should be obliged to do so. Then the issue in the specific instance would be whether Lundin Energy has been deprived of the means to meet its *potential* obligation to remedy. However, this approach does not escape a need to consider Lundin Energy's alleged contribution to human rights violations in Sudan. To assess the extent to which Lundin Energy is left with sufficient funds to fulfil any obligation to provide remedy, it is necessary to assess the degree of Lundin Energy's alleged contribution to the adverse impacts and consequent share of the responsibility to provide remedy proportional to its contribution to adverse impacts<sup>7</sup>. The Complaints fall short of addressing these questions but rather seem to imply that Lundin Energy is solely responsible for providing monetary compensation for war crimes and human rights violations committed by the government army and government-backed militia during a brutal civil war.

## 6 Whether there seems to be a link between the enterprises' activities and the issue raised in the specific instance

Aker BP is an oil- and gas company operating on the Norwegian continental shelf. The transaction in question allows for Aker BP to acquire the Norwegian oil- and gas operations of Lundin Energy, a business operating solely on Norwegian territory. The relevant activity for which it is claimed that Aker BP is in breach of the Guidelines, is a transaction between a Norwegian and a Swedish company shifting ownership of Norwegian assets.

Lundin Energy divested its operations in Sudan in 2003. As set out above, none of the companies that Aker BP acquired from Lundin Energy are linked to the alleged human rights impacts of Lundin Energy's operations in Sudan. Lundin Energy remains fully responsible for any liabilities and obligations they may have associated with the past activities in Sudan. With reference to the information that we provided in paragraph 2 of this letter, we respectfully submit that there is not a sufficient link between the activities of Aker BP or, even less so, Aker ASA as an investor, and the underlying issue raised in the specific instance.

## 7 How similar issues have been, or are being, treated in other domestic or international proceedings

Firstly, we note that very similar issues have been brought before a US federal court against the Canadian oil and gas producer Talisman under the US Alien Tort Claims Act. The plaintiff was the Presbyterian Church of Sudan, one of the founding members of the complainant South Sudan Council of Churches. The case *Presbyterian Church of Sudan v. Talisman Energy, Inc., U.S. District Court for the Southern District of New York - 244 F. Supp. 2d 289 (S.D.N.Y. 2003)* was dismissed in 2003, the dismissal was upheld on appeal in 2006 before the Supreme Court finally rejected further appeal in 2010. The case is reported by the organisation Business and Human Rights<sup>8</sup>:

*"In 2001, the Presbyterian Church of Sudan, as well as a number of Sudanese individuals, filed suit in US federal court against Talisman Energy. They alleged the company's complicity in the Sudanese Government's human rights abuses against non-Muslim Sudanese living in the area of Talisman's oil concession in southern Sudan (...) The court granted Talisman's motion to dismiss on 12 September 2006 finding that the plaintiffs had failed to supply sufficient admissible evidence to permit the lawsuit to go to trial on the plaintiffs' claims."*

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<sup>8</sup> <https://www.business-humanrights.org/en/latest-news/talisman-lawsuit-re-sudan/>

In 2010, PAX wrote the report “Unpaid Debt” for the European Coalition on Oil in Sudan – ECOS, with a call on the government of Sweden to pursue the accusations that Lundin Energy were complicit in war crimes and gross human rights violations. Shortly thereafter the Swedish Prosecution authority started its investigations that resulted in an indictment in November 2021. The underlying issues which are the subject matter of the Complaints are identical to the those of the ongoing Swedish criminal proceedings involving Lundin Energy. The Complaints concern Aker BP’s alleged failure to identify, prevent and mitigate adverse impacts related to Lundin Energy’s potential liability to compensate victims. It is difficult to see how that issue could be considered by the NCP whilst the criminal proceedings are ongoing.

The Complainants have submitted that consideration of the Complaints 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. This is an over-simplification. The subject matter of the specific instance concern Lundin Energy’s alleged obligation to pay compensation in the billions of dollars, which the Complainants seek to hold Aker BP accountable for. According to the Complaints, Swedish court has been asked to also rule on civil claims for compensation brought by a number of individuals, as described in the Complaints:

*“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 BP prevents that Lundin Energy becomes incapacitated to address severe ongoing (unremediated) impacts.”*

The Complainants stated objective for the NCP procedure would be, through the intervention of Aker BP, to ensure access to the same compensation and reparation for all 200 000+ victims that the Swedish court will be adjudicating for 32 of the victims. Hence the very same issues as those raised in the Complaints, are under consideration in a court case and there is no answer yet as to how they will be treated by the court.

## 8 Whether the consideration of the specific instance would contribute to the purposes and effectiveness of the Guidelines

It is our view that the consideration of this complaint would not contribute to the purposes and effectiveness of the Guidelines. This is partly because the outcomes that the Complainants seek, cannot be achieved through the NCP procedure. The Complainants’ main objective was to suspend the taking into effect of the merger on 30 June 2022. Ultimately, the Complainants seek to have Aker BP and Aker ASA take responsibility for Lundin Energy’s potential obligation to provide remedy to victims of human rights violations.

It is difficult to see how a dialogue and mediation process related to Lundin Energy’s alleged liability to provide remedy to victims could be conducted without regard to and implications for the ongoing criminal proceedings. Lundin Energy is not a party to the Complaints, and it would be both problematic and inappropriate for Aker BP (effectively in Lundin Energy’s place) to participate in a detailed examination of these issues or discuss them in a dialogue and mediation process before the NCP. In our view, consideration of a specific instance in parallel with Swedish criminal proceedings about the same underlying issues, might contribute to unclarity and confusion as to the demarcation lines between the NCP procedure and court procedures rather than furthering the purposes and effectiveness of the Guidelines.

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We respectfully request that the NCP rejects the Complaints. Should the NCP despite our concerns decide to take the matter under consideration and offer its good offices for dialogue and mediation, we will participate in the process in good faith and fully cooperate with the procedures set out by the NCP.