

MEMORANDUM

To: The Norwegian Consumer Council
C/O: Tone Molvær Berset

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Date: Oslo, 14 January 2020

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MEMORANDUM CONCERNING MYHERITAGE LTDS' TERMS OF USE, PRIVACY POLICY, ETC.

1. INTRODUCTION

We have been tasked with reviewing the contents of MyHeritage Ltd's (hereinafter "**MyHeritage**") terms of use, privacy policy, consent agreement and other additional documentation we find to be relevant, and assess whether this documentation is in compliance with Norwegian law, primarily with a view to Norwegian data protection legislation.

This assignment is limited to an assessment of the *documentation's* compliance with Norwegian law. We are therefore not assessing the lawfulness of MyHeritage's services as such. Based on our interpretation of the mandate of the assignment, we have assessed the following documents (hereinafter referred to as "**MyHeritage's documentation**"):

- MyHeritage's "*Terms and Conditions*" (hereinafter the "**terms of use**")
- MyHeritage's "*MyHeritage Privacy Policy*" (hereinafter the "**privacy policy**")
- MyHeritage's "*Definitions concerning privacy*" (hereinafter the "**privacy definitions**")
- MyHeritage's "*DNA Informed Consent Agreement*" (hereinafter the "**consent agreement**")

The assessments in the memorandum are mainly based on MyHeritage's documentation in the Norwegian version, although the English version has also been reviewed and referred to to the extent deemed necessary. The assessments in this memorandum are based on publicly available versions of MyHeritage's documentation as set out on www.myheritage.no and www.myheritage.com on the 7th of January 2020.

Following a request from Anne Kristin Vie of the Norwegian Consumer Council, we have prioritised those parts of the documentation that directly or indirectly deal with MyHeritage's DNA services, since the memorandum was commissioned in connection with the Norwegian Consumer Council's work on direct-to-consumer genetic testing services.

MyHeritage offers goods and services to both individuals and companies in most countries of the world, and has business offices and subsidiaries in a number of countries. The company's operations therefore raise a wide range of legal issues related to jurisdiction, choice of law and enforcement options. While these are of significance for the lawfulness of MyHeritage's documentation and the sanction options that actually exist, an exhaustive review of these issues falls outside this memorandum.

This memo is limited to the question of whether MyHeritage's documentation meets selected legal requirements applicable in Norwegian law for such documentation, in particular Section 22 of the Marketing Control Act on unfair contract terms and conditions and Articles 5, 12, 13 and 14 of the EU General Data

Protection Regulation ("GDPR"). These provisions set out a number of content and formal requirements for MyHeritage's documentation.

2. SUMMARY AND CONCLUSION

Based on our review and the specified conditions for it, we believe that parts of MyHeritage's documentation do not meet the content and information requirements applicable to such documentation under Norwegian law.

First, the terms of use contain a number of terms that are in conflict with invariable legislation and are therefore "unfair" in accordance with Section 22 of the Marketing Control Act. In addition, we believe that the terms are generally so unclear and, on a number of points, so unbalanced in favour of MyHeritage that a number of provisions by virtue of this will be "unfair" under the same provision. Our assessment of Section 22 of the Marketing Control Act is included in section 3.

Second, MyHeritage's documentation indicates that MyHeritage does not comply with the information requirements that ensue from Article 5 of the GDPR, cf. Articles 12, 13 and 14. Our assessment of MyHeritage's documentation compared with the GDPR's information requirements is set out in section 4 and most fully in section 4.3. In section 4.4, we linked some comments on MyHeritage's compliance with the GDPR's principles of lawfulness and privacy by design, based on the contents of MyHeritage's documentation.

3. UNFAIR TERMS IN MYHERITAGE'S DOCUMENTATION

3.1 Introduction – application and choice of law

The Marketing Control Act (MCA) governs marketing, commercial practices and contract terms and conditions in consumer relations, and requires traders to follow good business practice in their transactions with one another.¹ The Act applies to acts and terms and conditions that are directed at consumers or traders in Norway.²

The assessment of whether acts and terms and conditions are "directed at" *Norwegian* consumers depends on an overall assessment of the relevant acts or terms and conditions. For example, in this assessment it is relevant which language is used in connection with the acts or in the terms and conditions, the currency in which the prices are denominated and whether the trader accepts entering into agreements with Norwegian consumers.

MyHeritage is headquartered in Israel, with subsidiaries and offices in a number of other countries. MyHeritage has, as far as we know, no companies registered in Norway. However, the company has a number of employees working with the Norwegian market, including a director for MyHeritage in Norway and proprietary social media accounts aimed specifically at Norwegian consumers. The company offers its services, among other things, through the website myheritage.no, where marketing content, terms of use and privacy protection information is available in Norwegian, with prices quoted in Norwegian kroner.

On this basis, it can be assumed that MyHeritage's documentation is "directed at" Norwegian consumers, and that the provisions of the Marketing Control Act therefore apply to this documentation.³

¹ Section 1 of the Act relating to the Control of Marketing and Contract Terms and Conditions, etc. (Marketing Control Act/MCA).

² Section 4 of the MCA.

³ In this context, it is relevant that the country of origin principle in the Electronic Commerce Act, which applies to "any service which is normally performed for remuneration and which is provided electronically", cf. Section 1, second paragraph of the Electronic Commerce Act, will not be applied to "contractual terms in consumer contracts", cf. Section 6, first paragraph (c) of the Electronic Commerce Act.

3.2 Prohibition against unfair contract terms and conditions towards consumers

It follows from Section 22 of the Marketing Control Act that "[t]erms and conditions which are applied or are intended to be applied in the course of trade with consumers may be prohibited if they are deemed to be unfair to consumers and if general considerations call for such a prohibition".⁴

The provision gives the Market Council, and in some cases the Norwegian Consumer Authority, the authority to prohibit such terms, as regulated by the provision.⁵

It is clear from Supreme Court case law that the concept "terms" in this context includes more than just pure contractual terms and conditions in the strict sense, and that the provision must be deemed as having a "broad area of application towards terms which are often invoked".⁶ It can therefore be assumed that the provision applies to all parts of MyHeritage's documentation, and not only those parts that are expressly specified as terms of use or contract terms and conditions.⁷

The condition that "it must be found that general considerations call for such a prohibition" is included in the wording of the act to demonstrate that the Consumer Authority must be able to prioritise its activities with control of contract terms and conditions, and take measures in areas where the need is deemed to be the greatest.⁸ The assessment of whether general considerations call for such a prohibition is subject to the discretion of the consumer authorities and cannot be reviewed by the courts.⁹ The content of the condition is not discussed further in this memorandum.

However, for the memorandum's mandate, it is relevant to consider whether MyHeritage's documentation is "unfair to consumers", all the while such unfair consumer terms may be said not to be in accordance with Norwegian law.¹⁰

For this assessment of unfairness, the Act specifies two considerations that are to be emphasised.¹¹ The first is the consideration of balancing the rights and obligations of the parties. The assessment must be done in relation to the consumers as an aggregate group, and not whether a term seems unfair in an individual case. Concerning the threshold for when a prohibition can be imposed, the Supreme Court has stated that

⁴ Section 22, first paragraph of the MCA.

⁵ The prohibition authorisation ensues from Section 40 of the MCA. It is pointed out as a matter of form that continued application of a term that the Market Council or the Consumer Authority has prohibited will not automatically lead to the invalidation of civil law between the parties. In NOU 1976: 61 p. 54, the committee (which also studied the proposal for Section 36 of the Conclusion of Agreements Act in NOU 1979: 32) stated that "The Market Council's assessment should be accorded considerable weight if the same terms are to be tested under the general provision" – "Although it cannot be assumed as a general rule, there will be a strong presumption that the continued application of such a prohibited term in itself represents an unfairness." The Ministry endorsed these assessments, see Proposition No. 38 (1979-80) to the Odelsting, p. 34.

⁶ Rt. 2006 p. 1348 paragraphs 29-34.

⁷ Since the wording "terms and conditions" in Section 22 of the MCA is to be interpreted broadly, the provision may apply to both MyHeritage's terms of use and the associated privacy protection documentation. The latter will also be subject to a number of legal requirements under the Personal Data Act and the GDPR, which apply regardless of the Marketing Control Act. In addition, the requirements of the Personal Data Act and GDPR may also apply to parts of MyHeritage's terms of use, if these contain information intended to fulfil MyHeritage's obligations according to the data protection legislation. The area of application of the acts will therefore overlap to some extent. Out of consideration for the clarity and structure of the memorandum, we have primarily chosen to assess MyHeritage's terms of use under this section 3 concerning the Marketing Control Act and MyHeritage's privacy policy and consent agreement under section 4 concerning the Personal Data Act and the GDPR.

⁸ Cf. Section 38 of the MCL, discussed in Tore Lunde, et al. - *Markedsføringsloven med kommentarer* (The Marketing Control Act with comments), 1st edition, 2010, p. 134.

⁹ Lunde et al., p. 134 and Rt. 2006 p. 1867 paragraph 36.

¹⁰ The Act's wording that unfair terms and conditions "*may be prohibited*" expresses that the Act does not impose a general prohibition on certain agreements or agreement clauses, but authorises the Consumer Authority and the Market Council to impose such prohibitions. Terms and conditions prohibited by the Consumer Authority or the Market Council will normally be regarded as invalid in the context of civil law, but this will not always be the case. It is therefore debatable whether it is terminologically correct to refer to unfair terms as "unlawful" or "in violation of Norwegian law" before a prohibition is actually imposed on them. However, there is no further discussion of this in the memorandum.

¹¹ MCA 22 (2).

"a very large imbalance should not normally be required", with reference to the purpose of the provision to safeguard consumer protection.¹² However, it is not enough that "the balance could have been better".¹³

The second consideration to be emphasised is whether the presentation of the parties' rights and obligations is clearly laid out in the terms. An important factor in the assessment will be where the term is placed in the contract form, whether it is emphasised, whether the actual content of the term is unclear or formulated in a way that can be easily misunderstood.¹⁴

As Section 22 of the Marketing Control Act (together with Sections 36 and 37 of the Conclusion of Contracts Act) is regarded as part of the Norwegian implementation of Council Directive 93/13/EEC on unfair terms in consumer contracts¹⁵, the directive and associated practice from the EU and the EFTA Court are important for the interpretation of the Norwegian rule. For the fairness assessment, Article 4 of the Directive reads that this must

"be made on the basis of the type of goods and services that are the subject of the agreement, and taking into account all prevailing conditions at the time the agreement was entered into and all other terms of the agreement or any other agreement related thereto."

The first-mentioned consideration in this quote indicates a low threshold for deeming unbalanced and/or unclear terms in agreements on genetic self-testing unfair, considering the sensitive nature of such services.

Also of practical importance is the Annex to the Directive, which contains a non-exhaustive list of terms which would normally be considered unfair.¹⁶ In the preparatory works for the implementation of the Directive, it was stated by the Ministry that

"such contract terms and conditions mentioned in the list, at least if not individually negotiated, will in fact in most cases be deemed unfair under the general provision in Section 36 of the Conclusion of Contracts Act."¹⁷

Furthermore, it has been assumed in the preparatory works of the Marketing Control Act and in legal theory that terms that contravene invariable legislation will always be unfair.¹⁸

It is relevant in this context that the Marketing Control Act also implements Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices. This Directive lays down rules for which *practices* shall be considered unfair to consumers and contains an Annex (called the "Blacklist") which sets forth examples of commercial practices which are in all circumstances considered unfair. The Blacklist has been implemented in Norwegian law by a regulation to the Marketing Control Act (Regulation No. 565 of 1 June 2009). The finding of an unfair *commercial practice* will be a relevant step in assessing whether the related *terms(s)* are unfair under Section 22 of the MCA.¹⁹ We have not assessed examples of commercial practices conducted by MyHeritage in this memorandum, but have chosen to mention the Unfair Commercial Practices Directive because it is generally of great practical importance for the interpretation of Section 22 of the Marketing Control Act.

¹² HR-2006-1867-A, paragraph 43.

¹³ HR-2006-1867-A, paragraph 43.

¹⁴ Proposition No. 37 (1979-1980) to the Odelsting p. 39.

¹⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹⁶ Article 3 no. 3 in the Directive.

¹⁷ Proposition No. 89 (1993-1994) to the Odelsting, page 10.

¹⁸ Proposition No. 38 (1979-80) to the Odelsting p. 39 and Lunde et al., p. 136.

¹⁹ This has been determined, inter alia, by the European Court of Justice in Case C-453/10 (SOS). The European Court of Justice stated here that the finding of an unfair commercial practice is a relevant factor to consider when assessing whether the term is unfair under the Unfair Commercial Practices Directive, but this will not automatically mean that the term in question is considered unfair.

Since the aforementioned rules are supervisory rules, it is believed that management practices have great source of law-related weight in this area, both from Norway and from other EEA countries.²⁰ Therefore, in assessing whether a term is "unfair" in accordance with Section 22 of the MCA, the Consumer Authority's decisions, statements and guidelines that deal with the term will be important for the interpretation of the provision.²¹ Of particular relevance is the *Consumer Authority's guidelines on digital terms and conditions*²², which provides a number of examples of terms that may or may not be considered unfair under the provision. The European Commission's guidance on interpreting the "unfair terms" condition in Article 3 of Council Directive 93/13/EEC must likewise be assumed to be of significance for the interpretation of the Norwegian provision.²³

3.3 Assessment of whether MyHeritage's documentation contains unfair consumer terms

3.3.1 Introduction

Despite the fact that there is a relatively many legal sources that influences the interpretation of whether terms and conditions are "unfair" pursuant to Section 22 of the MCA, it is difficult to anticipate how specific terms will be assessed by the Consumer Authority, the Market Council and, if applicable, by the courts. The following review and assessment of MyHeritage's documentation must be read in light of this.

3.3.2 Unfairness as a result of lack of clarity in MyHeritage's terms of use

3.3.2.1 Length, formulations and language/translations of the terms of use

The consideration of clarity in consumer agreements is one of the two overriding considerations that form part of the assessment of whether such agreements contain "unfair" terms and conditions in accordance with Section 22 of the MCA. In the assessment of this consideration, how terms are highlighted and whether the actual content of the term is unclear or formulated in a way that can easily be misunderstood is of central importance.²⁴ In the Consumer Authority's guidelines, this consideration is adopted as an obligation to write contract terms and conditions in a plain and understandable manner, without heavy legal language or professional terms that are not used in everyday speech.²⁵ The Consumer Authority further points out that contract terms and conditions should not be longer than necessary.²⁶

MyHeritage's terms of use (in the Norwegian version) consists of just under 12,000 words, divided into approx. 200 sections. The terms will therefore be difficult to understand for most consumers solely due to the length of the text. In addition, it contains a number of legal and certain medical terms that will be difficult for the ordinary consumer to understand.

However, the length and use of such professional terms must be seen in light of the fact that MyHeritage provides a number of different services of a technically complex nature, and which gives rise to a number of legal obligations for the company. It is clear that MyHeritage has *attempted* to provide consumers with an understandable text to relate to, at least in the description of the services they provide and some potential data protection consequences and other adverse effects the use of the services may entail. An example of MyHeritage's attempt to bring clarity to the terms is that they offer the terms of use in a variety of languages.

²⁰ Gyldendal Rettsdata, note * to the Marketing Control Act by Morten Grandal.

²¹ See https://www.forbrukertilsynet.no/content/2018/03/Guidelines-digital-terms_english.pdf.

²² SeE <https://www.forbrukertilsynet.no/lov-og-rett/veiledninger-og-retningslinjer/forbrukertilsynets-veiledning-om-avtalevilkar-digitale-tjenester>.

²³ SeE [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)&from=EN).

²⁴ Proposition No. 37 (1979-1980) to the Odelsting p. 39.

²⁵ Under the heading "Language" in the guidelines.

²⁶ Under the heading "Length" in the guidelines.

The Norwegian translation undoubtedly makes it easier for Norwegian consumers to read the terms of use. However, MyHeritage proclaim that the translations are not binding on the company.²⁷ This can entail that the translations make the terms of use *less* clear, since consumers will have several versions to deal with. If such translations are to be deemed as contributing more to clarity than to lack of clarity, the translations must therefore be of high quality, so that they provide consumers with both a correct understanding of the terms and, not least, the confidence that they can trust the translation.

Based on our review of MyHeritage's terms of use in both the Norwegian and English versions, we believe this is not the case. The Norwegian version contains a number of typos and punctuation errors, as well as some formulations that appear to express a materially different content than the binding English version.

The latter can be illustrated by that section "4. Prisene kan endres"/ "4. Prices Subject to Change" has the following content in the Norwegian and English versions, respectively:

4. <u>Prices Subject to Change</u>	4. <u>Prices Subject to Change</u>
<p><i>"When the subscription is renewed, except in the case of a monthly subscription, MyHeritage will notify you via e-mail of the amount you were charged and the next due date for the subscription. Subscription prices can be changed at any time by MyHeritage. In the event of a change, the new prices will affect the next renewal of the subscription. Users who do not wish to continue with their subscription due to a price change may opt out of renewal as described in this agreement."</i></p>	<p><i>"Prices may be changed by MyHeritage from time to time. For the current prices, see price list. Prices may be subject to additional taxes and customs charges, depending on the country in which you reside.</i></p> <p><i>Following each payment, MyHeritage will send you an email with the details of the purchase and the amount charged."</i></p>

The above presentation shows that MyHeritage has formulated terms for price changes in the Norwegian version that are materially different from the corresponding terms in the English version. This makes it difficult for Norwegian consumers to understand what actually applies (without asking for clarification from MyHeritage), since the material difference seems to be deliberate on the part of MyHeritage. Lack of clarity to this extent must be presumed to be sufficient to establish that the terms and conditions are "unfair" pursuant to Section 22 of the MCA.

Of other shortcomings or errors in the Norwegian translation we also mention that:

- several paragraphs of the Norwegian version of the terms of use are written in English,
- the Norwegian version of the privacy policy uses "legitim interesse" as a translation of the term "legitimate interest", instead of "berettiget interesse" used in the official translation of the GDPR, and that
- the Norwegian version refers to "spesielle kategoriske data" as a translation of the term "special categories of personal data" instead of "særlige kategorier av personopplysninger" used in the official translation.

In addition to the fact that such linguistic differences may by themselves result in the unfairness threshold being reached, they will as mentioned above influence the consumer's perception and understanding of the contractual relationship as a whole. Although the length, the language and the existence of a somewhat inadequate translation by themselves are hardly sufficient for deeming the entire framework agreement as "unfair", these conditions can be taken into account for unfairness in the assessment of specific terms or parts of the framework agreement.

²⁷ See text included at the top of the terms of use.

3.3.2.2 Structure and presentation of the terms of use

In the assessment of whether the terms and conditions are "unfair" in accordance with Section 22 of the MCA, emphasis, as mentioned above, shall be placed on the need for clarity in contractual relations. For the assessment of this consideration, the structure and general presentation of the terms and conditions are important.

In this context, the Consumer Authority recommends that the most important terms for the consumer are emphasised and that the terms are structured using formatting, headings and a table of contents.²⁸ In addition, the Norwegian Data Protection Authority recommends that information provided electronically be presented in layers.²⁹ In such a layered presentation, the most important information can be briefly summarised in the first layer, while allowing users to click through to the other layers if more complete information is desired.

MyHeritage's terms of use compliance with said requirements and recommendations regarding structure and presentation is negligible. The terms of use do indeed have a separate section entitled "*Welcome to MyHeritage*", but according to the content this is closer to an introduction than a real overview of the terms and conditions that apply to the use of the company's services.

The terms of use also contain a number of headings and subheadings, but these only contribute a limited degree of clarity and readability. This is because the formatting in the agreement appears somewhat random, with only a few numbered subheadings and little clarity as to what are headings and what are subheadings, and which subheadings belong to which headings. It is also somewhat unclear in some places whether text is highlighted to accentuate a subheading, or just to highlight the importance of the contents of the text. Furthermore, some terms are placed under headings/subheadings that correspond poorly with the contents of the terms and conditions, which makes it very difficult for consumers to inform themselves about their own rights and obligations.

An example of the latter is the following paragraph on disclaimer of liability, which is included under the subheading "*Genetisk forskning er ikke uttømmende og er i konstant utvikling*" / "*Genetic Research is not Comprehensive and Constantly Progresses*":

<p><i>"You agree to hold MyHeritage, its subsidiaries, employees, directors, agents, licensors, managers and any third party acting on our behalf, and their respective officers, agents, partners and employees, harmless from any loss, liability, claim or demand, including reasonable attorneys' fees, made due to or arising out of your use of or access to the DNA Services and any implications of such use."</i></p>	<p><i>"You agree to indemnify and hold MyHeritage, its subsidiaries, employees, directors, agents, licensors, managers, affiliates and any third party acting on our behalf, and their respective officers, agents, partners and employees, harmless from any loss, liability, claim, or demand, including reasonable attorneys' fees, made due to or arising out of your use of or access to the DNA Services and any implications of such use."</i></p>
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We believe the fact that such a comprehensive indemnification is placed as a final paragraph in a longer text about something else (under an unclear subheading), is per se a strong indication that the term should be considered "unfair" pursuant to Section 22 of the MCA. The same is also true for a number of other indemnity clauses and disclaimers that MyHeritage has included in separate contexts in the terms of use.³⁰

²⁸ Under the heading "Presentation" in the guidelines.

²⁹ <https://www.datatilsynet.no/rettigheter-og-plikter/virksomhetenes-plikter/gi-informasjon/informasjon-og-apenhet/?id=11034>The statements concern the presentation of data protection documentation, but the recommendation can also be regarded as good practice for the presentation of terms of use.

³⁰ See for example the final sentence in section 1.52 in Annex 1 and section 2.51 in Annex 2.

In summary, MyHeritage's terms of use are structured in such an over-complex manner that the structure of the framework agreement can be taken into account for unfairness in the assessment of specific terms or parts of the framework agreement.

3.3.2.3 Unclear terms – right of use to DNA information

In addition to the fact that MyHeritage's terms of use as a whole can be regarded as unclearly formulated and structured, they also contain a number of terms whose contents, in isolation, are difficult to understand.

An example of this is found in the third paragraph under the section "DNA-tjenester" / "DNA Services" with the following wording:

<p><i>"By submitting DNA samples to us and/or DNA results on the website, you grant us royalty-free, worldwide license to use your DNA samples, the DNA results and resulting DNA reports, and, solely for purposes of the DNA genealogy services, any DNA samples and/or DNA results you submit on behalf of any person who has given you the legal authorization to do so as described in this section, and the resulting DNA reports, to the extent that we need to do so to be able to deliver the service to you. The license you grant us is not perpetual and can be revoked, and you can permanently delete DNA results and DNA reports from the website at any time and order us to destroy your DNA samples. [...]"</i></p>	<p><i>"By submitting DNA samples to us and/or DNA Results to the Website, you grant us a royalty-free, world-wide license to use your DNA samples, the DNA Results and the resulting DNA Reports, and, solely for purposes of the DNA Genealogy Services, any DNA samples and/or DNA Results you submit for any person from whom you obtained legal authorization as described in this Section and the resulting DNA Reports, to the minimum extent necessary to allow us to provide the Service to you. The license you grant to us is not perpetual, and it is revocable as you are able at any time to delete your DNA Results and DNA Reports permanently from the Website and to have us destroy your DNA samples. [...]"</i></p>
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In our opinion, it is difficult for anyone, especially the ordinary consumer, to understand the essential content and consequences of the quoted text. MyHeritage appears to be giving itself a licence, i.e. a right of use, to DNA samples, DNA results and DNA reports about consumers. However, it is unclear exactly what this right of use actually entails.

The key limitation of this right of use is that MyHeritage can only use said samples, results and reports to the extent they "need to [...] to be able to deliver the service to you". Such formulations are often found in terms of use and privacy policies associated with Internet services, all the while they seemingly grant service providers far-reaching rights over which the provider itself largely controls the scope. It can be assumed that the wording is included in the terms of use primarily to ensure the company a right to present DNA information to its users within the service itself. Since it can be difficult to list all the possible ways it may be possible to accomplish this, it is not unnatural that MyHeritage limits itself to general wording.

However, it is obvious that the right of use *could* have been clarified and defined much more clearly. This must also be seen in light of what the ambiguity is related to, namely something as important as MyHeritage's use of DNA samples, results and reports. This clearly indicates that the ambiguity in question means that the term may be considered "unfair" to MyHeritage's customers.

MyHeritage, for its part, is likely to believe that limitations in their use of DNA samples, results, and reports are clear when the term is read in conjunction with other parts of the documentation, e.g. of the privacy policy. However, this highlights the problem of including data protection-related information in the terms of use, which the data protection legislation addresses directly. Such a practice makes it difficult for consumers/data subjects to understand how personal data is used, and is therefore advised against and in some cases unlawful. As the cited terms make it unclear which right of use MyHeritage reserves for the use of DNA information about consumers, we believe they must be deemed "unfair" pursuant to Section 22 of the MCA.

3.3.2.4 Unclear terms – "Health Family Tree"

Another example of unclear terms is MyHeritage's terms related to the "Health Family Tree" feature, regulated under a separate section of the terms of use. This is described as "an optional feature designed to keep your family's health information organised in one place", which is also "designed to facilitate research (both internally and through third-party organisations) for the purpose of creating and supporting scientific discoveries, and to publish some of these discoveries in scientific journals". Further down in the terms, the right of MyHeritage (and potentially also third parties) to use the health information in question is expanded, including for the development of commercial products. Like the above assessment of MyHeritage's right to use DNA information, we believe that the terms of the "Health Family Tree" are so unclear that, in light of what they regulate, they must be considered "unfair" pursuant to Section 22 of the MCA.

In this context, too, we believe that the dual regulation across the terms of use and the privacy protection documentation contributes to more lack of clarity than clarity, and indicates unfairness.

3.3.3 Unfairness resulting from unbalanced rights and obligations

3.3.3.1 *Lack of limitations in terms of use*

A prerequisite for both clarity and balance in a contractual relationship is that both parties are in fact able to assess what is included in the agreement. Contract terms and conditions that have the purpose or effect of binding a party without knowing what is included in an agreement will therefore often be unfair.

This issue is, among other things, taken into account in the Annex to Council Directive 93/13/EEC. The Annex establishes that it will normally be unfair in consumer relationships to

"irrevocably bind the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract".

In our assessment, MyHeritage's terms of use require such "acceptance". For this purpose, we refer to the section "Hele avtalen" / "Entire Agreement" in the terms of use which read as follows (with our emphasis):

<p><i>"This Agreement, together with the MyHeritage Privacy Policy, the DNA Informed Consent Agreement ("Informed Consent ") and any other legal notices or terms published by MyHeritage on the website (as applicable), shall constitute the entire agreement between you and MyHeritage concerning the website and the service. [...]"</i></p>	<p><i>"This Agreement, together with the MyHeritage Privacy Policy, the DNA Informed Consent Agreement (the "Informed Consent") and any other legal notices or terms published by MyHeritage on the Website (as applicable), shall constitute the entire agreement between you and MyHeritage concerning the Website and the Service. [...]"</i></p>
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The cited term, if taken on its word, means that a consumer must search the entire MyHeritage site in search of "any other legal notices or terms", and it is unclear what is required in order for something to be deemed such legal notices or terms. By its wording, the term therefore means that MyHeritage can in practice include text anywhere on the website, outside or behind login, and claim that such text is legally binding on consumers. Since consumers also have no control over where such text stands or when such text is added or removed, it theoretically gives MyHeritage an unlimited opportunity to unilaterally change the contract terms and conditions with the company's customers.

The cited term must therefore be considered to be "unfair" pursuant to Section 22 of the MCA.

3.3.3.2 *Choice of law, venue and right of action*

As mentioned in section 3.1, the Marketing Control Act applies to MyHeritage's documentation, even though the company offers its services from abroad. Furthermore, it is stated, as mentioned in the preparatory

works of the provision, that contract terms and conditions in contravention of invariable legislation will always be "unfair" under Section 22 of the MCA.

Such a invariable statutory provision is found in Section 4-5 (7) of the Dispute Act, which establishes that consumers may bring an action against a trader at his/her own ordinary venue, i.e. where they live.³¹ This general rule can only be waived by agreement (with effect for the consumer) if the agreement is concluded after a dispute has arisen.³²

Against this background, and similar consumer legislation in the EU, both the Consumer Authority and the European Commission have assumed that contract terms and conditions that deviate from such choice of law and venue rules will normally be "urimelig" / "unfair", cf. Section 22 of the Marketing Control Act and Article 3 of Council Directive 93/13/EEC on unfair terms in consumer contracts.³³

Furthermore, the Annex to the Directive states that it would normally be unfair to

"inappropriately exclude or limit the legal rights of the consumer *vis-à-vis* the seller or supplier or another party [...] in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations".³⁴

The cited wording covers, among other things, the narrowing of consumers' right of action.

As a result, we assume that the following terms in MyHeritage's terms of use are "unfair" pursuant to Section 22 of the MCA (taken from various parts of the terms of use).

<p><u>"Limitations with respect to DNA Services</u></p> <p><i>You agree that, regardless of any statute or law to the contrary (to the extent allowed by applicable law), any claim or lawsuit arising out of or related to the use of DNA services or this section must be filed within one (1) year after the claim or cause of action arose, or be waived forever. "</i></p>	<p><u>"Statute of Limitations with respect to the DNA Services</u></p> <p><i>You agree that, regardless of any statute or law to the contrary (to the extent allowed by applicable law), any claim or cause of action, arising out of or related to use of the DNA Services or this Section, must be filed within one (1) year after such claim or cause of action arose or be forever barred."</i></p>
<p>"Entire agreement</p> <p><i>This agreement and any disputes regarding the service shall be exclusively governed by the laws of the State of Israel, without regard to choice of law rules, and you agree that legal proceedings regarding the execution, performance and/or enforcement of this agreement shall be brought exclusively before the courts in Tel Aviv, Israel. You agree that the service will be deemed passive and will not give rise to personal jurisdiction over MyHeritage, either specific or general, in jurisdictions other than Israel. In the unlikely event that we have not been able to resolve a dispute we have with you when you attempt to do so informally, all claims must be brought in each party's individual capacity and not as a representative plaintiff or</i></p>	<p>"Entire agreement</p> <p><i>This Agreement and any dispute regarding the Service shall be exclusively governed by the laws of the State of Israel, without regard to conflict of law provisions, and you agree that any legal proceeding about the execution, performance and/or enforcement of this Agreement shall be brought exclusively to the courts located in Tel Aviv, Israel. You agree that the Service shall be deemed passive and will not give rise to personal jurisdiction over MyHeritage, either specific or general, in jurisdictions other than Israel. In the unlikely event that we have not been able to resolve a dispute we have with you after attempting to do so informally, all claims must be brought in each party's individual capacity and not as a representative plaintiff or</i></p>

³¹ Dispute Act Section 4-5 (7), cf. Section 4-4 (2).

³² Dispute Act Section 4-6 (3).

³³ See the Consumer Authority's guidelines on contract terms and conditions for digital services and pages 17 and 35 of the European Commission's *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts* – available here: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)&from=EN), with further reference to European Court of Justice case law. See also subparagraph 1 (g) in the Annex to Council Directive 93/13/EEC and the Market Council's decision in MR-1982-6 where they concluded that it was unreasonable to establish a venue in Bærum as this would result in increased costs for consumers that could not be justified on the basis of practical or necessary circumstances of the seller.

³⁴ Subparagraph 1 (a) of the Annex.

<p><i>class member in any purported class or representative proceeding. You agree that by entering into this Agreement, each of you and us waives the right to participate in a class action claim."</i></p>	<p><i>class member in any purported class or representative proceeding. You agree that, by entering into this Agreement, each of you and us waives the right to participate in a class action claim."</i></p>
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3.3.3.3 Unilateral modifications of terms

When and how an agreement can be changed is obviously of great importance for the balance between the parties' rights and obligations. Since consumer services are often continuously evolving, it is therefore common for suppliers to include contract terms and conditions that regulate how the agreement shall or can be changed. However, such terms could easily be considered unfair in accordance with Section 22 of the MCA if the right to make changes becomes too one-sided, too unlimited or lacks sufficient justification.

The issue is discussed, among other things, in the Annex to Council Directive 93/13/EEC. The Annex states that it will normally be unfair

- "to enable the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so"³⁵,
- "to enable the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract"³⁶ and
- "to enable the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided"³⁷.

However, the Annex specifies that the type of case in the second bullet point above is without hindrance:

- "to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract."³⁸

What must be considered sufficiently "serious" and "valid" grounds in accordance with the list above will vary from contractual relationship to contractual relationship. The Annex must at least be understood to mean that terms providing for right of termination and other amendments of the contractual relationship that do not link the amendment to one or more specified grounds must normally be considered unfair, unless the trader is required to give reasonable notice and the consumer has free right of cancellation.

The Consumer Authority accordingly provides the following example of a term that, in their opinion, would be unfair:

"We are entitled to amend these terms and conditions at our own discretion at any time without providing notification. It is your responsibility to check our website regularly to see whether any amendments have been made to your contract. If you continue to use the service after we have amended the terms and conditions, you consent to being bound by them".³⁹

The Authority's example is substantively virtually identical to MyHeritage's regulation of amendments to their terms of use, which for that matter are discussed in both the section "*Overblikk*" / "*Welcome to MyHeritage*" and under "*Endringer av avtalen og tjenesten*" / "*Modifications to this Agreement and the Service*":

³⁵ Subparagraph 1 (g) of the Annex.

³⁶ Subparagraph 1 (j) of the Annex.

³⁷ Subparagraph 1 (k) of the Annex.

³⁸ Subparagraph 2 (b) of the Annex.

³⁹ The Consumer Authority's guidelines on digital terms and conditions, under "Amendments to terms and conditions".

<p><i>"We reserve the right to modify any of these provisions from time to time, at our sole discretion, and such modifications shall be effective immediately upon posting to the website. You agree to be bound by any change to this agreement if you continue to use the Service after any such modification is posted."</i></p>	<p><i>"We reserve the right to modify any provision hereof from time to time, in our sole discretion, and such modification shall be effective immediately upon its posting on the Website. You agree to be bound to any changes to this Agreement if you continue to use the Service after any such modification is posted".</i></p>
<p><i>"We reserve the right, at our sole discretion, to modify the agreement or service at any time. The changes to the service will be posted on the website. If you do not accept or cannot comply with all or parts of this agreement or the service or the changes, and this will result in a breach of the agreement, you must discontinue use of the service. Continued use of the service now or following changes in the agreement means that you accept and are bound by the changes.</i></p> <p><i>Whenever this agreement is modified, the label updated will be displayed prominently next to the link "Service Terms" that leads to this agreement, in the footer of the pages of the service. The updated label will be removed after 30 days or when you visit the updated terms and conditions to read them, whichever comes first."</i></p>	<p><i>"We retain the right, at our sole discretion, to modify this Agreement or the Service at any time. Changes in Service will be posted on the Website. If any portion of this Agreement or any change of this Agreement of the Service is unacceptable to you or will cause you to no longer be in compliance with this Agreement, you should discontinue use of the Service. Continued use of the Service now or following changes in this Agreement means that you have accepted and are bound by the changes. It is therefore important that you check the current version available from time to time and ensure you are updated as to any changes.</i></p> <p><i>Whenever this Agreement is modified in substance, the label updated will be displayed prominently next to the link "Service Terms" that leads to this Agreement, in the footer of the pages of the Service. The updated label will be removed after 30 days or when you visit the updated Terms and Conditions to read them, whichever comes sooner."</i></p>

Another variant of the same clause is included in MyHeritage's privacy policy under the heading "Oversikt" / "Overview". It reads as follows:

<p><i>"If we decide to modify our privacy policy, we will issue an updated version of this privacy policy with an updated date legend (and notify you via e-mail or by other appropriate means) so that you will be aware of what information we collect, how we use it and under what circumstances we publish it in accordance with applicable law. If you do not consent to the privacy policy or any changes to it, and as a result you do not want us to use or hold your information in accordance with the revised terms, you may contact us (see the contact information at the bottom of this privacy policy) so that we will delete your information and/or account.</i></p> <p><i>Whenever this privacy policy has been modified in any way, the label "Updated" will be displayed prominently next to "Privacy Policy" in the footer of the website pages. The "updated" label will be removed after 30 days or when you visit the</i></p>	<p><i>"If we decide to modify our Privacy Policy, we will issue an updated version of this Privacy Policy with an updated date legend (and notify you via email or by other appropriate means if the changes are material) so that you will be aware of what information we collect, how we use it and under what circumstances we disclose it in accordance with applicable law. If you do not consent to the Privacy Policy or to any changes thereto and as a result you would like us not to use or hold your information in accordance with the revised terms, you may contact us (see contact information at the bottom of this Privacy Policy) so that we will delete your information and/or account.</i></p> <p><i>Whenever this Privacy Policy is modified in substance, the label "updated" will be displayed prominently next to the "Privacy Policy" link in the footer of the Website pages. The "updated" label</i></p>
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<p><i>updated privacy policy to read it, whichever comes first.</i></p> <p><i>Use of the website following any changes constitutes your acceptance of the revised privacy policy then in effect. If you do not agree to this privacy policy, you must not use the website."</i></p>	<p><i>will be removed after 30 days or when you visit the updated Privacy Policy to read it, whichever comes sooner.</i></p> <p><i>Use of the Website or the Service following any changes constitutes your acceptance of the revised Privacy Policy then in effect. If you do not agree to this Privacy Policy, please do not use the Website or the Service."</i></p>
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Also mentioned in this regard is MyHeritage's specification of "Tidsperiode" / "Term" for the terms of use, point f under "Ansvarsfraskrivelse" / "Disclaimers" and the section "Priser kan endres" / "Prices Subject to Change".

<p><i>"This section applies to the DNA services currently in use or previously used. You may remove DNA results associated with your account at any time, for any reason, from the profile into which you or we uploaded them. We may remove DNA results and/or DNA reports and/or terminate membership at any time, without notice. Even after membership is terminated, the proprietary rights established in this agreement will remain in effect."</i></p>	<p><i>"This section applies to the DNA Services currently in use or previously used. You may remove DNA Results associated with your account at any time, for any reason, from the profile into which you or we uploaded them. We may remove your DNA Results and/or DNA Reports and/or terminate your membership at any time, without notice. Even after membership is terminated, the proprietary rights set forth in this Agreement will remain in effect."</i></p>
<p><i>"MyHeritage may in its sole discretion, but is not obligated to, preview, review, screen, remove, or edit the DNA Results and DNA Reports."</i></p>	<p><i>"MyHeritage may in its sole discretion, but is not obligated to, preview, review, screen, remove, or edit the DNA results and DNA reports."</i></p>
<p><i>"Prices may be changed by MyHeritage at any time."</i></p>	<p><i>"Prices may be changed by MyHeritage at any time."</i></p>

All of the cited terms give MyHeritage a unilateral right to amend the agreement with its customers, without this right to make amendments being linked to any specified grounds or restrictions, or imposing any requirement on MyHeritage to give notice of the changes in a timely manner. The terms therefore fall within the wording of the aforementioned types of cases in the Annex to Council Directive 93/13/EEC, and should therefore normally be deemed "unfair" pursuant to Section 22 of the MCA.

Taking into account the sensitive nature of the services in question and the potentially serious consequences of such unilateral terms for changing the agreement and the service, we believe it must be assumed that the terms and conditions cited above are "unfair" pursuant to Section 22 of the MCA.

3.3.4 Comprehensive indemnification and disclaimers

The consideration of the balance between rights and obligations is particularly relevant in relation to contract terms and conditions that exclude or limit the trader's statutory liability and/or consumer rights. This is expressed, among other things, in the statements in the preparatory works for the Marketing Control Act, that terms that contravene invariable legislation should always be considered unfair.⁴⁰ For responsibilities and rights arising from declaratory legislation, it is further stated in the preparatory works that the statutory

⁴⁰ Proposition No. 38 (1979-80) to the Odelsting p. 39 and NOU 1976: 61 pp. 61-62.

rule will be a reasonable starting point for the assessment of balance.⁴¹ The same can be assumed to apply to non-statutory liability rules and rights, but this must be considered unresolved.⁴²

This issue is also taken into account in the Annex to Council Directive 93/13/EEC. The Annex states that it will normally be unfair

- "to exclude or limit the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier"⁴³ and
- "to inappropriately exclude or limit the legal rights of the consumer vis-à-vis the seller or supplier or another party [...] in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations"⁴⁴

Furthermore, the Consumer Authority's guidelines on digital terms and conditions lists three examples which, under to the circumstances, may be unfair:⁴⁵

- "Terms and conditions stating that you are not liable for a paid service not working as agreed",
- "Terms and conditions that limit the size of the consumer's damages to a low amount in relation to the value of the contract" and
- "Terms and conditions that impose a disproportionately high fee on the consumer if he or she breaches the contract".

The same guidelines list three examples of terms and conditions that, in the opinion of the Authority, *will* be unfair:⁴⁶

- "The company has no liability to the customer if the service does not work as agreed or expected",
- "The company's liability in damages is never greater than an amount equivalent to one month's fee"
- "If the customer acts in breach of these terms and conditions, a fee equivalent to a one-year subscription rate will be imposed"

Under Norwegian law, consumers' rights in service contracts are only partially regulated by law. Except for the limited cases where consumer rights in such contractual relationships are regulated by law, the general rule will be that such agreements are subject to the parties' freedom to contract. In such cases it can therefore be difficult to find clear grounds for the legal positions on which an assessment of balance pursuant to Section 22 of the MCA should be based. However, in cases of major and disproportionate disclaimers, as exemplified in the Annex to Council Directive 93/13/EEC and in the Consumer Authority's guidelines, it can nevertheless easily be found to be unfair.

The same will be the case for contract terms and conditions that derogate from data subjects' rights under the Personal Data Act and the GDPR, as these can only be exceptionally waived by agreement. Since MyHeritage's deliverables to consumers involve the processing of customers' personal data, data protection legislation could serve as a basis for assessing whether MyHeritage's terms and conditions are "unfair" pursuant to Section 22 of the MCA. Of central importance are the invariable provisions of the Personal Data Act and the GDPR regarding compensation and redress for anyone who has suffered damage or loss as a result of a violation of the GDPR.⁴⁷

⁴¹ Proposition No. 38 (1979-80) to the Odelsting p. 18.

⁴² A certain amount of support for this view can be found in the European Court of Justice's decision in Case C-226/12 Constructora Principado, paragraphs 21-24.

⁴³ Subparagraph 1 (a) of the Annex.

⁴⁴ Subparagraph 1 (b) of the Annex.

⁴⁵ Under the section "Liability if something goes wrong" in the guidelines.

⁴⁶ Under the section "Liability if something goes wrong" in the guidelines.

⁴⁷ Section 30 of the Personal Data Act and Article 30 of the GDPR.

MyHeritage's terms of use contain a number of provisions that exclude or limit the company's liability and the customers' rights in relation to what is the basis in Norwegian law. This includes terms that directly exclude MyHeritage from any liability for providing a contractual service, exclude MyHeritage from criminal and damages liability to a great extent, and impose a virtually unlimited liability on consumers to hold MyHeritage harmless.

Some of the most comprehensive examples from MyHeritage's documentation include the following (taken from various parts of the terms of use):

<p><i>"[...] You hereby release us from any and all claims, liens, actions or suits in connection with DNA testing, DNA samples, DNA results and/or DNA reports, including, but not limited to, errors, omissions, claims for defamation, invasion of privacy, right of publicity, emotional distress or economic loss. This section continues even if you stop using the website or the DNA services".</i></p>	<p><i>"[...] You hereby release us from any and all claims, liens, demands, actions or suits in connection with the DNA testing, DNA samples, DNA Results and/or DNA Reports, including, without limitation, errors, omissions, claims for defamation, invasion of privacy, right of publicity, emotional distress or economic loss. This section continues even if you stop using the Website or the DNA Services."</i></p>
<p><i>"[...] We do not endorse and have no control over the DNA sample(s), DNA results and DNA reports. We make no warranties, express or implied, as to the DNA results and DNA reports or to the accuracy, reliability, completeness, quality, currency, error-free nature, compatibility, security or fitness for the purpose of the website or the DNA services or DNA reports."</i></p>	<p><i>"[...] We do not endorse and have no control over the DNA sample(s), DNA Results and DNA Reports. We make no warranties, express or implied, as to the DNA Results and DNA Reports or to the accuracy, reliability, comprehensiveness, completeness, quality, currency, error-free nature, compatibility, security or fitness for purpose of the Website or the DNA Services or the DNA Reports."</i></p>
<p><i>"Without derogating from the "Limitation on Liability" sub-section below (under "Disclaimers, Limitation on Liability and Indemnity"), you should be aware that the DNA services are controlled from our facilities in the United States. We make no warranties that the DNA services are appropriate or available for use in other locations. Those who access or use the DNA services from other jurisdictions do so at their own volition and are responsible for compliance with local laws."</i></p>	<p><i>"Without derogating from the "Limitation on Liability" Sub-Section below (under the Section "Disclaimers, Limitation on Liability and Indemnity"), you should note that the DNA Services are controlled from our facilities in the United States. We make no representations that the DNA Services are appropriate or available for use in other locations. Those who access or use the DNA Services from other jurisdictions do so at their own volition and are responsible for compliance with local law."</i></p>
<p><i>"To the extent permitted by applicable law, in no event shall MyHeritage, its officers, agents, representatives, employees, licensors and affiliates be responsible for any errors or inaccurate information in connection with the service, whether caused by users of the website, members, our advertisers or corporate partners, or any of the equipment or programming associated with or utilised in the operation of the website or services. MyHeritage shall not be responsible for any implications of DNA results and/or DNA reports as to whether or not they are correct."</i></p>	<p><i>"To the maximum extent permitted by applicable law, in no event shall MyHeritage, its officers, agents, representatives, employees, licensors and affiliates be responsible for any incorrect or inaccurate information in connection with the Service, whether caused by users of the Website, members, our advertisers or corporate partners, or by any of the equipment or programming associated with or utilized in the operation of the Website or the Services. MyHeritage shall not be responsible for any implications of the DNA Results and/or DNA Reports whether or not they are correct or incorrect."</i></p>

<p><i>"MyHeritage and its licensors and affiliates are not responsible for the conduct, whether online or offline, of any member or other user of the website. To the extent permitted by applicable law, we shall in no event be responsible for any loss or damage, including lost data, lost information, personal injury or death, or privacy implications resulting from anyone's use of the site or the service, all information posted on the website or transmitted to members or other users, or any interactions between or among members or other users of the website, whether online or offline."</i></p>	<p><i>"MyHeritage and its licensors and affiliates are not responsible for the conduct, whether online or offline, of any member or other user of the Website. To the maximum extent permitted by applicable law, in no event shall we be responsible for any loss or damage, including lost data, lost information, personal injury or death, or privacy implication resulting from anyone's use of the Website or the Service, any information posted on the Website or transmitted to members or other users, or any interactions between or among members or other users of the Website, whether online or offline."</i></p>
<p><i>"MyHeritage assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, user or member communications; and is not responsible for any problems or technical malfunction of telephone networks or lines, computer electronic systems, servers or providers, computer equipment, software, failure of e-mail or players on account of technical problems or traffic congestion on the Internet or on any website or combination thereof. MyHeritage and its affiliates are not responsible for any injury or damage to computer equipment belonging to users of the website, a member, or any other person in connection with or as a result of using the website, viewing, playing or downloading materials on or from the website, or otherwise in connection with the service."</i></p>	<p><i>"MyHeritage assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, user or member communications; and is not responsible for any problems or technical malfunction of any telephone network or lines, computer online systems, servers or providers, computer equipment, software, failure of e-mail or players on account of technical problems or traffic congestion on the internet or at any website or combination thereof. MyHeritage and its affiliates are not responsible for any injury or damage to any computer equipment belonging to any user of the Website, any member, or any other person related to or resulting from use of the Website, viewing, playing or downloading any materials on or from the Website, or otherwise in connection with the Service."</i></p>
<p><i>"The service and the website are provided "as-is" and "as available" and, unless otherwise prohibited by law, MyHeritage disclaims any warranty of any kind, expressed or implied, including, but not limited to, warranties of merchantability, fitness for a particular purpose, right and non-infringement and satisfactory quality, or that the website will be available at any particular time or place, uninterrupted or secure; that any failure or errors will be corrected; or that the service is free of viruses or other harmful components. We do not guarantee any specific results from use of the service. The service may contain links to third-party websites that are not owned or controlled by us. We have no control over, and assume no responsibility for, the content, policies or practices of any third party websites. You expressly relieve us from any and all liability arising from your use of third-party websites or services. We do not warrant, endorse, guarantee or assume responsibility for any specific</i></p>	<p><i>"The Service and the Website are provided "as-is" and "as available" and, except as otherwise prohibited by applicable law, MyHeritage expressly disclaims any warranty of any kind, expressed or implied, including, without limitation, any warranty of merchantability, fitness for a particular purpose, title and non-infringement and satisfactory quality, or that the Website will be available at any particular time or location, uninterrupted or secure; that any defects or errors will be corrected; or that the Service is free of viruses or other harmful components. We do not guarantee any specific results from use of the Service. The Service may contain links to third-party websites that are not owned or controlled by us. We have no control over, and assume no responsibility for, the content, policies, or practices of any third-party websites. You expressly relieve us from any and all liability arising from your use of any third-party website or services. We do not warrant, endorse, guarantee,</i></p>

<p><i>course of action, resources, tests, physicians or other health care professionals, medicines, biologicals, medical devices or other procedures or opinions, or any product or service advertised or offered by a third party through the service or any hyperlinked website, or featured in any banner or other advertising, or other information that may be mentioned on the website. We will not be a party to or in any way monitor any transaction between you and third-party providers of products or services. We and our third-party suppliers make no representations concerning the suitability, reliability or accuracy of content provided by the website for any purpose. In no case will we or our third party providers be liable for any direct, indirect, punitive, special or other damages including, but not limited to, loss profits, loss of data or other damages in contract, tort, equity or other legal theory, even if it is informed of the possibility thereof."</i></p>	<p><i>or assume responsibility for any specific course of action, resources, tests, physician or other healthcare providers, drugs, biologics, medical devices or other procedures or opinions, or any product or service advertised or offered by a third party through the Service or any hyperlinked website, or featured in any banner or other advertising, or other information that may be mentioned on the Website. We will not be a party to or in any way monitor any transaction between you and third-party providers of products or services. We and our third party suppliers make no representations concerning the suitability, reliability or accuracy of the content provided by the Website for any purpose. In no case will we or our third party providers be liable for any direct, indirect, punitive, special or other damages including, without limitation, lost profits, loss of data or any other damage in contract, tort, equity or any other legal theory, even if advised of the possibility thereof."</i></p>
<p><i>"In no event shall MyHeritage (or its third party suppliers) be liable to you or any third party for any indirect, consequential, exemplary, incidental, special or punitive damages, including damages arising from the use of or inability to use the service or any portion thereof, even if we have been advised of the possibility of such damages. Regardless of what is contained in this document, our (or our third party suppliers') liability to you or any third party for any cause whatsoever and regardless the form of the action, will at all times be limited to the amount paid, if any, by you to us for the service during the membership period. We assume no liability resulting from any (i) errors or inaccurate content; (ii) personal injury or property damage, of any nature, resulting from your access to and use of the service; (iii) unauthorized access to or use of our servers and/or any and all information stored therein; (iv) any interruption or cessation of transmission to or from the service; (v) any bugs, viruses, trojan horses, or the like, which may be transmitted to or through the service; and/or (vi) any loss or damage of any kind arising out of your use of the service, whether based on warranty, contract, indemnity or other legal theory. The foregoing limitations of liability shall apply to the extent permitted by law in the applicable jurisdiction."</i></p>	<p><i>"In no event shall MyHeritage (or its third party suppliers) be liable to you or any third party for any indirect, consequential, exemplary, incidental, special or punitive damages, including damages arising from your use of or inability to use the Service or any portion thereof, even if we have been advised of the possibility of such damages. Notwithstanding anything to the contrary contained herein, our (or our third party suppliers') liability to you or any third party for any cause whatsoever and regardless of the form of the action, will at all times be limited to the amount paid, if any, by you to us for the Service during the term of membership. We assume no liability resulting from any (i) errors, mistakes, or inaccuracies of content; (ii) personal injury or property damage, of any nature whatsoever, resulting from your access to and use of the Service; (iii) any unauthorized access to or use of our servers and/or any and all information stored therein; (iv) any interruption or cessation of transmission to or from the Service; (v) any bugs, viruses, trojan horses, or the like, which may be transmitted to or through the Service; and/or (vi) any loss or damage of any kind incurred as a result of your use of the Service, whether based on warranty, contract, tort, or any other legal theory. The foregoing limitations of liability shall apply to the fullest extent permitted by law in the applicable jurisdiction."</i></p>
<p><i>"Because some countries/jurisdictions do not allow the exclusion or limitation of liability for</i></p>	<p><i>"Because some states/jurisdictions do not allow the exclusion or limitation of liability for consequential</i></p>

<p><i>consequential or incidental damages, this limitation may not apply (in part) to you. IF YOU ARE DISSATISFIED WITH ANY PART OF THIS SERVICE, OR WITH ANY OF THE TERMS OF THIS AGREEMENT, YOU MUST PURELY AND SIMPLY DISCONTINUE USING THE SERVICE."</i></p>	<p><i>or incidental damages, this limitation may not apply in part to you. IF YOU ARE DISSATISFIED WITH ANY PORTION OF THIS SERVICE, OR WITH ANY OF THE TERMS OF THIS AGREEMENT, YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USING THIS SERVICE."</i></p>
<p><i>"You agree to hold MyHeritage, its subsidiaries, employees, directors, agents, licensors, managers, agents and any third parties acting on our behalf and their respective officers, agents, partners and employees, harmless from any loss, liability, claim or demand, including reasonable attorneys' fees, made by a third party due to or arising out of your use of or access to the service, your violation of this Agreement and/or any breach of your representations and warranties set forth above and/or if any information that you post on the website or otherwise submit to us or through the service imposes liability on us vis-à-vis any third party."</i></p>	<p><i>"You agree to indemnify and hold MyHeritage, its subsidiaries, employees, directors, agents, licensors, managers, affiliates and any third party acting on our behalf, and their respective officers, agents, partners and employees, harmless from any loss, liability, claim, or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your use of or access to the Service, your violation of this Agreement and/or any breach of your representations and warranties set forth above and/or if any information that you post on the Website or otherwise submit to us or through the Service causes us to be liable to any third party."</i></p>

Broadly speaking, the above terms mean that MyHeritage:

- does not guarantee that they can provide their services to customers outside the United States,
- make no guarantees that the services will be delivered as agreed,
- exempts itself, its employees and partners from any liability in connection with the use of MyHeritage's services (including DNA services), including from any claims, liens, legal actions or lawsuits that may arise in connection with their DNA services, including claims in connection with personal injury, death or "privacy implications" (including "any unauthorised access to or use of our servers and/or any and all information stored therein"), and
- imposes a responsibility on users of the service to hold MyHeritage (and a number of other persons and companies) harmless from any conceivable claim or liability that may arise from users' utilisation of the company's services

Some of these terms do indeed have general disclaimers that they are applicable only to the extent permitted by applicable law or similar, but such disclaimers occur only exceptionally and will in any event be of limited importance to consumers. For most consumers, it will be disproportionately burdensome to examine what such disclaimers actually entail for their legal status, thereby contributing to a lack of clarity about what the contract terms and conditions actually contain and mean to them. In addition, the cited terms are scattered around the terms of use, and occasionally included as part of longer sections, so that users must scour the terms of use in their entirety in order to have a theoretical possibility of understanding what the agreement entails for them.

When the sensitive nature of the services in question and the potentially serious consequences of such unbalanced terms are also taken into account, we consider it appropriate to deem all of the above terms and conditions as "unfair" pursuant to Section 22 of the MCA. For those parts of the terms that delimit MyHeritage's mandatory liability under the data protection legislation, it is clear that the terms are "unfair".

4. VIOLATION OF GDPR IN MYHERITAGE'S DOCUMENTATION

4.1 Introduction – application of law and enforcement options

The Personal Data Act and the GDPR apply to the processing of personal data carried out in connection with the activities of the operations of data controllers and data processors in Norway, regardless of whether the processing takes place in the EEA or not.⁴⁸ The Act and the GDPR also apply to the processing of personal data about data subjects who are located in Norway, and which is carried out by a data controller or data processor who is not established in the EEA, if the processing is linked to

- a) the offering of goods and services to data subjects in Norway, irrespective of whether a payment of the data subject is required; or
- b) the monitoring of their behaviour as far as their behaviour takes place within Norway.⁴⁹

As discussed in section 3.1 above, MyHeritage clearly offers services to consumers in Norway. Given that the services are inextricably linked to the processing of consumers' personal data, it can also be assumed that the Personal Data Act and the GDPR apply to the processing of personal data about Norwegian consumers.

Companies outside the EEA that process personal data about data subjects in the EEA as described above must, under Article 27 of the GDPR, designate a representative to be established in one of the member states where such data subjects are located.⁵⁰ This representative shall furthermore be authorised to be the person whom the supervisory authorities and data subjects can address in the event of issues relating to the processing.⁵¹ However, the appointment and authorisation shall not affect the right to take any legal action against the company.⁵²

MyHeritage's documentation does not refer to any companies or representatives other than the Israeli company MyHeritage Ltd. Moreover, no other contact information is provided for the company other than privacy@myheritage.com.⁵³ Although there is a MyHeritage company registered in the United Kingdom – MyHeritage UK Ltd, we have been unable to find any information about it other than some basic company information.

It is therefore unclear to us whether MyHeritage has appointed a representative as required by Article 27 of the GDPR, but we assume that this could be easily resolved by sending an e-mail to the above e-mail address. However, since this question does not affect the application of the Personal Data Act or the GDPR to MyHeritage's processing of personal data about Norwegian consumers, nor does it affect the possibility of taking legal action against the company, we have not investigated this further.

4.2 GDPR's requirements for lawfulness, fairness and transparency

Pursuant to Article 5 of the GDPR, the processing of personal data shall be in accordance with five basic principles of personal data protection, including the principle that all processing shall be done in a lawful, fair and transparent manner with respect to the data subject ("lawfulness, fairness and transparency").⁵⁴

The openness principle (also known as the principle of transparency) has been implemented, among other things, through a series of articles that establish specific information and documentation obligations for data controllers, including requirements regarding the contents of the data controller's privacy policy. The

⁴⁸ Section 1, first paragraph of the Act relating to the Processing of Personal Data (Personal Data Act) and GDPR Article 4

⁴⁹ Section 4 of the Personal Data Act

⁵⁰ GDPR Article 27 nos. 1 and 3

⁵¹ GDPR Article 27 nos. 4

⁵² GDPR Article 27 nos. 5

⁵³ Admittedly, there is a separate e-mail address for copyright-related enquiries: copyright@myheritage.com, but it is not considered relevant to this memorandum.

⁵⁴ GDPR Article 5 no. 1 (a)

essence of the principle is that the data subject shall receive good information on how the personal data in question is processed.

In light of the memorandum's mandate, we have limited the assessment of MyHeritage's documentation to primarily these provisions, in particular Articles 12, 13 and 14. These provisions specify the information obligations that the data controller must comply with in order to meet the requirements that ensue from the data subjects' rights. These obligations are closely related to the principle of transparency as discussed above and are interpreted in this light.⁵⁵ We have only linked some comments to MyHeritage's documentation in light of the *lawfulness principle* and the *principle of privacy by design* in section 4.4 below.

Article 12 sets out general requirements for the *implementation* of the data subject's rights, and stipulates that the presentation of information referred to in Articles 13 and 14 be provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language.⁵⁶ Furthermore, the data controller shall enable the data subject to exercise their rights under Articles 15-22.⁵⁷

Article 13 concerns information to be provided at the time when personal data are obtained from the data subject, while Article 14 concerns information to be provided if personal data about the data subject is collected from parties other than the data subject itself. In the former case, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:

- the identity and the contact details of the controller (also of the data protection officer or representative in the EEA if the undertaking has one)
- the purposes of the processing for which the personal data are intended as well as the legal basis for the processing,
- where the processing is based on Article 6 no. 1 (f), the legitimate interests pursued by the controller or by a third party,
- the recipients or categories of recipients of the personal data, if any, and
- whether the data will be transferred out of the EU/EEA with relevant additional data.⁵⁸

At the same time, the controller shall also provide the data subject with the following further information necessary to ensure fair and transparent processing:

- the period for which the personal data will be stored,
- the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability,
- the right to withdraw consent at any time (if consent is the processing basis),
- the right to lodge a complaint with a supervisory authority,
- whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data, and
- the existence of automated decision-making, including profiling, and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.⁵⁹

⁵⁵ The Article 29 Working Party, Guidelines on transparency under Regulation 2016/679, Adopted on 29 November 2017, As last Revised and Adopted on 11 April 2018, WP 260, see in particular pp. 5, 6, 11, 12, 13 and 17 on Article 12, see pp. 13–34 on Articles 13 and 14 and Annex on pp. 35–40 for what kind of information is to be provided under Articles 13 and 14.

⁵⁶ GDPR Article 12 no. 1.

⁵⁷ GDPR Article 12 no. 2.

⁵⁸ Wessel-Aas, Jon and Ødegaard, Magnus, Personvern – Publisering og behandling av personopplysninger (Publishing and processing of personal data), p. 255, somewhat reworded from GDPR Article 13 no. 1.

⁵⁹ Wessel-Aas, Jon og Ødegaard, Magnus, Personvern – Publisering og behandling av personopplysninger (Publishing and processing of personal data), pp. 255-256, somewhat reworded from GDPR Article 13 no. 2

Where personal data have not been obtained from the data subject, the controller shall provide the data subject with information as required by Article 14. The duty of disclosure includes the same information listed above, but in such cases, the controller shall also disclose:

- from which source the personal data originate, and – if relevant – whether it came from publicly accessible sources,⁶⁰ and
- the categories of personal data concerned.⁶¹

Under Article 14, the controller shall provide the information within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed.⁶² The information obligations under Articles 13 and 14 do not apply in cases where the data subject already has the information.⁶³

While little case law currently exists on the interpretation of the aforementioned provisions, a number of earlier decisions concerning the EU's previous data protection directive may, according to the circumstances, also be relevant for the interpretation of the GDPR. Administrative practice at the EU and national level will also be important.

The EU's former advisory body on data protection issues, the *Article 29 Working Party* or the *Expert Group*, has adopted a number of different statements and recommendations on how the GDPR should be complied with and enforced. From May 2018, the working party was replaced by the European Data Protection Supervisor (EDPS). The EDPS has continued a number of the Article 29 Working Party's recommendations and has, since 2018, prepared a number of its own.⁶⁴ These recommendations are not binding in the same way as a law or regulation, but their recommendations specify how EEA data protection authorities should deal with or work on relevant issues. The recommendations are therefore of great practical importance and will be important for the interpretation of the GDPR and the Norwegian Personal Data Act. In relation to this memorandum, the Article 29 Working Party's *Guidelines on transparency under Regulation 2016/679* are of particular relevance, since they deal precisely with GDPR Articles 5, 12, 13 and 14.⁶⁵

4.3 Assessment of whether MyHeritage's documentation is in violation of GDPR Article 5, cf. Articles 12, 13 and 14

4.3.1 General overview of the clarity and availability of MyHeritage's privacy documentation

The presentation of information as mentioned in GDPR Articles 13 and 14 shall, in accordance with Article 12, be provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular as regards information specifically aimed at a child. Therefore, the general comments on the terms of use regarding lack of clarity and demarcation in sections 3.3.2 and 3.3.3.1 above will also be of direct importance in assessing whether MyHeritage's information obligations under the GDPR are met.

The circumstances highlighted in the aforementioned sections clearly indicate that this is not the case. In this context, note is made of the length of the documentation, occasionally complicated language, lack of

⁶⁰ GDPR Article 14 no. 2 (f).

⁶¹ GDPR Article 14 no. 2 (d).

⁶² GDPR Article 14 no. 3 (a).

⁶³ GDPR Article 13 no. 4 and 14 no. 5 (a). This may be the case, for example, if MyHeritage provides information to its customers in other ways than through its webpages, e.g. by providing supplemental written information that accompanies their DNA test kits. However, we have not had access to such test kits, and our assessment is based solely on the public presentation of MyHeritage's documentation on the Internet.

⁶⁴ See https://edpb.europa.eu/our-work-tools/general-guidance/gdpr-guidelines-recommendations-best-practices_en.

⁶⁵ WP260 rev.01, most recently updated 11 April 2018 and later continued by EDPS, available here https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227.

clarity created by inadequate and non-binding translations⁶⁶, and the documentation's occasionally over-complex and random structure and presentation.

In this connection, it is particularly relevant to point out the lack of clarity that has arisen because MyHeritage has included a number of terms and conditions in its terms of use, which according to their wording, apply to matters governed by the data protection legislation, including a description of processing activities and specification of the legal basis for such activities. Examples of this are given in 3.3.2.3 and 3.3.2.4. This practice is explicitly advised against by the Article 29 Working Party, which has stated that privacy information should be "clearly differentiated from other non-privacy related information such as contractual provisions or general terms of use".⁶⁷

This issue is also relevant in connection with MyHeritage's consent agreement, which applies to users who share DNA information with MyHeritage for use in "DNA-based research (both internally and through third-party organizations)". This consent agreement states, inter alia, that participation in such research presupposes that users must "read and accept" MyHeritage's terms of use. Since no rules are specified for which documents take precedence over others, it is difficult to assess what the meaning of this "acceptance" of the terms of use will be, as the terms contain a number of general formulations that, by their wording, expand, restrict or supplement the content of the consent agreement.

Furthermore, a data controller whose services target children shall take this into account in fulfilling the GDPR's information obligations. In this regard, the Article 29 Working Party has stated that:

"Where a data controller is targeting children or is, or should be, aware that their goods/services are particularly utilised by children (including where the controller is relying on the consent of the child), it should ensure that the vocabulary, tone and style of the language used is appropriate to and resonates with children so that the child addressee of the information recognises that the message/information is being directed at them. A useful example of child-centred language used as an alternative to the original legal language can be found in the "UN Convention on the Rights of the Child in Child Friendly Language"

WP29's position is that transparency is a free-standing right which applies as much to children as it does to adults. WP29 emphasises in particular that children do not lose their rights as data subjects to transparency simply because consent has been given/ authorized by the holder of parental responsibility in a situation to which Article 8 of the GDPR applies.

While such consent will, in many cases, be given or authorised on a once-off basis by the holder of parental responsibility, a child (like any other data subject) has an ongoing right to transparency throughout the continuum of their engagement with a data controller. This is consistent with Article 13 of the UN Convention on the Rights of the Child which states that a child has a right to freedom of expression which includes the right to seek, receive and impart information and ideas of all kinds. It is important to point out that, while providing for consent to be given on behalf of a child when under a particular age, Article 8 does not provide for transparency measures to be directed at the holder of parental responsibility who gives such consent".⁶⁸

Because MyHeritage allows parents and guardians to consent to the processing of personal information about children, including the submission of DNA samples and other health information, the statements above apply to MyHeritage's documentation to a great extent. It falls outside the mandate of this memorandum to assess whether this practice has been lawfully implemented, but it is clear that it at least

⁶⁶ This is also addressed by the Artikel 29 Working Party in their Guidelines on transparency under Regulation 2016/679, paragraph 13.

⁶⁷ Guidelines on transparency under Regulation 2016/679, WP260 rev.01, paragraph 8.

⁶⁸ Guidelines on transparency under Regulation 2016/679, WP260 rev.01, paragraph 14.

places particularly high demands on the company's presentation of privacy information, so that children may also be able to understand and enforce their own rights on this basis.

This is not taken into account to any extent in MyHeritage's privacy documentation. The information gives a clear impression of being directed exclusively at adults, and is expressed in language that is often difficult to understand. This is also stated directly in MyHeritage's terms of use, where parents or guardians are requested to review MyHeritage's documentation with any children who "use" the company's service. Such requests, in light of the opinions of the Article 29 Working Party above, cannot be considered sufficient for safeguarding the protection of children's privacy.

It is therefore our opinion, based on the ambiguities and lack of delineation in MyHeritage's documentation reviewed in this section 4.3.1, in sections 3.3.2 and 3.3.3.1, as well as the lack of facilitation enabling children to understand the documentation, that the general presentation of MyHeritage's privacy documentation does not meet the presentation requirements of GDPR Article 12.

4.3.2 Assessment of the specific information obligations in GDPR Articles 13 and 14

4.3.2.1 *Introduction*

Section 4.2 lists a number of pieces of information that, according to the GDPR, requires the controller to provide to data subjects at the time when personal data are obtained. In the sections below, we have repeated these requirements and commented on whether they are satisfactorily disclosed in MyHeritage's documentation:

4.3.2.2 *The identity and contact details of the data controller etc.*

Requirements under GDPR Articles 13 and 14: That the controller provides the identity and the contact details of the controller (also of the data protection officer or representative in the EEA if the undertaking has one).

MyHeritage's documentation: MyHeritage's documentation only states the company name "MyHeritage", and no further information about the legal person (business address, organisation number, etc.) that provides the service. This is problematic because it makes it difficult for data subjects to know where and how to assert their rights, including how to bring legal claims against the company. Nor is any representative for the company listed in the EEA, which the company is required to have (provided that the business is offered from outside the EEA).

Furthermore, only one e-mail address is provided for privacy protection-related enquiries. The Article 29 Working Party recommends that such enquiries be made in various ways.⁶⁹

Our assessment: In our opinion, MyHeritage's documentation does not meet this information requirement. For compliance, the documentation must, at a minimum, be updated with supplementary company information and details about any data protection officers and/or representative in the EEA to comply. MyHeritage should also offer more options for data subjects to contact the company.

4.3.2.3 *Purpose and legal basis for the intended processing of personal data*

Requirements under GDPR Articles 13 and 14: That the controller provides the purposes of the processing for which the personal data are intended as well as the legal basis for the processing.

Further details about the requirement: The requirement means that the controller must specify the purposes of *all* of the processing activities carried out, although a certain degree of generalisation/grouping of these must necessarily be allowed. In addition, the legal basis for each of these processing activities must be stated. It is therefore not sufficient to list processing activities, purposes and legal grounds separately,

⁶⁹ Guidelines on transparency under Regulation 2016/679, WP260 rev.01, see the annex to the guidelines.

unless this is done in a manner that makes it easy for the data subject to identify the legal grounds for each separate processing/processing activity. For the sake of clarity and accessibility, this information should be presented together, and not spread out in different parts of a privacy policy (and at least not across terms of use and privacy policy).

MyHeritage's documentation: In MyHeritage's documentation, the company's processing of personal data is discussed in both the company's terms of use, privacy policy and consent agreement, with the consequence that it is difficult to gain an overview of the total scope of processing operations that are carried out.

An example of this can be found in the first section under the heading "*Genetic Research is not Comprehensive and Constantly Progresses*" in the terms of use. The penultimate sentence of the section states that MyHeritage "reserves the right to update your DNA health reports based on new information, data or scientific findings". From what we can see, the grounds on which this processing is based is not specified anywhere in MyHeritage's documentation.

Furthermore, information about which personal data is processed for various purposes is also discussed in various places in the company's privacy policy. An example of this is that the purposes for processing IP addresses, click stream data and cookies are specified in a separate section of the privacy policy and not together with the seemingly exhaustive listing made under the section "*How Do We Use Your Personal Information?*"

Another example is the listing of processing activities under the heading "*DNA Genealogy Services and DNA Health Services*" in MyHeritage's privacy policy. The first sentence states that using the "DNA Genealogy Services and DNA Health Services" permits MyHeritage to "make acceptable use of [DNA] samples", without any further explanation of what such use entails. The sentence is otherwise so long and extensive that it will be difficult for most consumers to understand its contents.

Even more problematic is the overall lack of specification of what information is used for what and the legal basis that applies to the various processing activities. Although MyHeritage's privacy policy does indeed specify a number of categories of personal data that are processed together with specific examples of data included in these categories, when the processing purposes are listed, reference is consistently made to processing of "your personal information", "personal information" and the like. Since such formulations encompass all personal data MyHeritage has about the data subjects, the result is that the terms are either imprecise or give MyHeritage disproportionately wide latitude for processing the data subjects' personal data.

An illustrative example can be found under the heading "*To provide the Service*", which states that MyHeritage "uses your personal information to let you know about new features or other offers of interest from MyHeritage, or to address customer service needs and requests". It seems quite obvious that MyHeritage will not (or have the right to) use DNA information to "let you know about new features" or "address customer service needs and requests", but the privacy policy offers this as a possibility purely linguistically. It can also be noted that there is little agreement between the heading and the subsequent description of processes, given that information about "other offers of interest" can hardly be part of "providing the service".

The privacy policy also contains a separate section on the legal grounds on which the company bases its processing of personal data (entitled "*Legal grounds for the processing of personal information*"), but this is done without linking these grounds to the various processing activities or purposes thereof. This means that it is either impossible or disproportionately difficult for data subjects to understand which personal data are processed for which purposes and legal grounds.

Our assessment: In our opinion, MyHeritage's documentation does not meet this information requirement. To be in compliance, the documentation must, at a minimum, make it possible to link each processing activity/category of processing activity with the respective purposes and legal grounds that apply to them.

MyHeritage should also gather all relevant information in one place so that data subjects can have an overview of the processing of personal data without having to read every single section of the terms of use, the privacy policy and, as the case may be, the consent agreement.

4.3.2.4 *The legitimate interests pursued by the controller or by a third party*

Requirements under GDPR Articles 13 and 14: That the data controller discloses - if personal data is processed based on GDPR Article 6 no. 1 (f) - the legitimate interests pursued by the data controller or by a third party.

MyHeritage's documentation: MyHeritage's privacy policy states that in some cases the company will process personal data on grounds that "the processing is in our legitimate commercial interests, subject to your interests and fundamental rights (e.g. analytics which we carry out of your use of the Website)". In addition to the example given in the parentheses in the previous sentence, the privacy policy contains only one further specification of when this basis is used for processing. This is stated under the section "*Data retention*", which states that the company will have a "legitimate interest" in using contact details for marketing purposes after the expiry of the subscription period. However, it is unclear whether these two examples are the only processes that are carried out based on the company's legitimate interest according to GDPR Article 6 no. 1 (f), or only selected examples.

Regardless, MyHeritage does not state *which* legitimate interests are being pursued, thus forming the legal basis for processing done pursuant to GDPR Article 6 no. 1 (f). The closest one comes to such a specification is the general reference to MyHeritage's "business interests" which is under the heading "*What personal information is collected from you or about you?*".

Our assessment: In our opinion, MyHeritage's documentation does not meet this information requirement. To be in compliance, the documentation must, at a minimum, clearly identify which processing activities/categories of processing activities are carried out pursuant to Article 6 no. 1 (f) of the GDPR and state what legitimate interests underlie the processing. In addition to which legitimate interests will be pursued, MyHeritage should include other key information on the *balance test* that MyHeritage is required to conduct in order to process personal data by virtue of GDPR Article 6 no. 1 (f).⁷⁰ This information should be gathered in one place and presented in layers.

4.3.2.5 *Any recipients or categories of recipients of the personal data*

Requirements under GDPR Articles 13 and 14: That the data controller provides information about any recipients or categories of recipients of the personal data.

Further details about the requirement: The requirement means that the data controller must provide information about all "*recipients*" or categories of "recipients" of personal data. The term recipient is defined in Article 4 (9) of the GDPR as any "natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not". The definition will include third parties acting as a *data processor* for MyHeritage, as well as a number of other actors.

The requirement does not mean that data controllers must always name each recipient of personal data, as it may also be sufficient to disclose the categories of such recipients. However, this must be seen in light of the principle of fairness and the ability of data subjects to enforce their own rights. In this connection, the Article 29 Working Party has stated that

"The actual (named) recipients of the personal data, or the categories of recipients, must be provided. In accordance with the principle of fairness, controllers must provide information on the recipients that is most meaningful for data subjects. In practice, this will generally be the named recipients, so that data subjects know exactly who has their personal data. If controllers opt to

⁷⁰ Guidelines on transparency under Regulation 2016/679, WP260 rev.01, see the annex to the guidelines.

provide the categories of recipients, the information should be as specific as possible by indicating the type of recipient (i.e. by reference to the activities it carries out), the industry, sector and sub-sector and the location of the recipients"⁷¹

MyHeritage's documentation: MyHeritage's documentation is full of explicit and implicit references to MyHeritage sharing personal information with a number of "recipients", as this term is defined in the GDPR. Nevertheless, the section "Will MyHeritage disclose any of my personal information to third parties?" states that "[p]ersonal information provided by our users is never sold, licensed or otherwise shared by us with advertisers, sponsors, partners or other third parties". However, the following paragraph states that "MyHeritage will not disclose any of your personal information except in very limited circumstances which are set out below", followed by four paragraphs of exceptions.

These paragraphs list a number of broad exceptions, save one specific reference to a third party (PWNHealth LLC). Of great practical importance is point iii, "*To third-party service providers*", which states that "For example, we use third party platforms to process payments from you or use a specialized DNA lab to extract, process and store your DNA samples". However, no specification is given. The section also does not refer to any of MyHeritage's research or cloud/network service partners, with which MyHeritage obviously shares personal information.

The consent agreement is also very vague in its description of who can receive the personal data regulated by it. For example, section "G. *How will MyHeritage and its affiliates protect my information?*", states that MyHeritage "will not release Research Information that identifies you outside MyHeritage and/or its family of companies without first asking for and receiving your authorization to do so", without specifying what is meant by the term "family of companies (affiliates)". From what we can see, there are no notable delimitations (or specification) of who can receive the information shared by virtue of the consent agreement.

The lack of clarification as to which recipients or categories of recipients to whom MyHeritage discloses personal data makes it impossible for data subjects to investigate who processes their personal data. It will also be impossible for data subjects to know whether providers that provide assistance to MyHeritage as subcontractors of data centres or lab services, process personal data with a valid legal ground (for example, a data processor agreement that complies with the GDPR requirements).

Our assessment: In our opinion, MyHeritage's documentation does not meet this information requirement. To be in compliance, the documentation must, at a minimum, clearly identify which categories of recipients receive personal information from MyHeritage. In light of the principle of fairness, we believe that recipients who receive DNA information and other health information should, as far as possible, be specifically named. This information should also be gathered in one place.

4.3.2.6 *Relevant information on the transfer of personal data out of the EU/EEA*

Requirements under GDPR Articles 13 and 14: That the data controller discloses relevant information on the transfer of personal data out of the EU/EEA.

Further details about the requirement: The requirement means that the data controller must inform the data subjects whether personal data will, or potentially will, be transferred outside the EU/EEA. If the recipient is located in a country that does not have an adequate level of protection (for example, the United States), they shall be informed of this, and the contractual warranties provided for sound privacy protection shall be explained along with where the data subject can obtain a copy of them, or where they have been made available.

MyHeritage's documentation: MyHeritage states in its privacy policy that personal and genetic information is processed and stored in the company's data centres in the United States. However, no further information is provided on where these data centres are in the United States or whether they are run by MyHeritage

⁷¹ Guidelines on transparency under Regulation 2016/679, WP260 rev.01, see the annex to the guidelines.

itself or by third parties. Nor does MyHeritage's documentation contain any information about the contractual warranties for sound privacy protection provided in connection with the processing in the United States, including which of the grounds for transfer in Chapter V of the GDPR is the basis of the processing operation.⁷²

In addition to the reference to the data centres in the United States, MyHeritage's documentation clearly states that use of the service may result in the transfer of genetic and other health information to all countries where MyHeritage's services are available. This is due to the fact that the service permits sharing such information between users and that access to personal data in itself constitutes processing according to the GDPR. The privacy implications of this are only implicitly addressed in MyHeritage's documentation.

Our assessment: In our opinion, MyHeritage's documentation does not meet this information requirement. To be in compliance, the documentation must, at a minimum, provide exhaustive information about which third countries personal data may be transferred to, and which contractual warranties/grounds for transfer are the basis of such transfers.

4.3.2.7 *The period of time personal data will be stored*

Requirements under GDPR Articles 13 and 14: That the controller provides information about the period of time the personal data will be stored, or if this is not possible, the criteria used to determine this period.

Further details about the requirement: This requirement must be seen in the context of the requirements of GDPR Article 5 (1) (c) on data minimisation and (e) that personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed. In this regard, the Article 29 Working Party has stated that it is not sufficient to generically state that personal data will only be kept as long as necessary for the various purposes for which it is processed, but that the storage period or storage period criteria should be stipulated for each purpose.

⁷³

MyHeritage's documentation: MyHeritage's privacy policy sets out relevant information under the heading "*Data retention*". It states that MyHeritage "will retain your personal information only for as long as necessary to fulfil the purpose(s) for which it was collected and to comply with applicable laws". This is further explained in the following paragraph:

In general, this means that we store your personal information for as long as is required to deliver our services, except where we have a lawful basis for saving it for an extended period of time (for instance, after your subscription expires, we may still have a legitimate interest in using your contact details for marketing purposes). We also retain the personal information we need for the execution of pending tasks and the personal information we need to realize our legal rights and our claims, as well as certain personal information that we must store for a legally mandatory period of time. When certain personal information is only saved due to a legally mandatory preservation term, the processing of it by us is limited, even where you do not specifically request this. If you agreed to the informed consent, we may retain the information provided thereunder for as long as we determine required for the research purposes disclosed therein.

Our assessment: In our opinion, MyHeritage's documentation does not meet this information requirement. To be in compliance, the documentation must, at a minimum, be specified to a considerable degree. It is clear that MyHeritage's services require the continuous processing of personal data by a data subject as long as they are a user of the services, but the information and/or categories of information this applies to can nevertheless be specified. It can also be specified what information and/or categories of information are

⁷² See <https://www.datatilsynet.no/rettigheter-og-plikter/virksomhetenes-plikter/overfore/> for more information. We cannot find MyHeritage on the list of companies approved for disclosure of personal data to the United States under the Privacy Shield agreement, but we cannot exclude that they are registered under a different company name.

⁷³ Guidelines on transparency under Regulation 2016/679, WP260 rev.01, see the annex to the guidelines.

necessary or relevant to process after use of the services ends. Once such a specification is made, it should also be possible to specify on what basis any further processing is based and on which criteria further storage time is based. Given how the current documentation is designed, it is impossible for the data subject to predict what personal data is stored while the data subject is a user, what information is stored after user accounts have been deleted and how long such storage can potentially take place.

4.3.2.8 *The right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject, etc.*

Requirements under GDPR Articles 13 and 14: That the controller discloses the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject, or to object to processing as well as the right to data portability.

MyHeritage's documentation: In MyHeritage's documentation, an attempt to fulfil this information requirement appears to have been made with the information provided under the section "*Data subject rights*", which reads as follows:

1.1 The right to access information held about you. This right can normally be exercised free of charge, however, we reserve the right to charge an appropriate administrative fee where permitted by applicable law, for instance where you request multiple copies of your information. 1.2 The right to object to processing which has our legitimate interests as its lawful basis (see the "LEGAL GROUNDS FOR THE PROCESSING OF PERSONAL INFORMATION" section above). 1.3 The right to obtain a portable copy of personal information which is processed on the basis of your consent, or which is necessary for the performance of a contract between us (see the "LEGAL GROUNDS FOR THE PROCESSING OF PERSONAL INFORMATION" section above). 1.4 The right to request details of the basis on which your personal information is transferred outside of the European Economic Area. 1.5 MyHeritage may request that you provide some form of photographic identification to them so that they can verify your identity. Any request should be in writing and addressed to MyHeritage by email at privacy@myheritage.com or through customer support. MyHeritage will use reasonable efforts to supply personal information about you on its files. MyHeritage shall endeavour to respond as soon as practicably possible."

In addition, there are a number of references in MyHeritage's documentation to data subjects' *ability* to review, amend and delete certain personal information, and change certain privacy settings in the service. For DNA information, it is stated in certain places that data subjects have a right to delete such information.

Our assessment: We believe MyHeritage's documentation only partially meets this information requirement. Overall, it is clear from the documentation that MyHeritage users have the ability to view, amend and delete personal information processed by MyHeritage, but it is unclear whether MyHeritage practices this in relation to all personal information that is processed, or just a selection thereof. In addition, MyHeritage has recounted only some of the rights that the data subjects have under the GDPR, and those that have been recounted are consistently recounted in an inadequate manner. Furthermore, the references to the data subjects' right to object to processing based on legitimate interests are relatively ineffective, all the while it is not clear which processing this applies to (see sections 4.3.2.3 and 4.3.2.4). To be in compliance, the aforementioned shortcomings and ambiguities must be rectified. Furthermore, the relevant information should be gathered in one place.

4.3.2.9 *The right to withdraw consent at any time*

Requirements under GDPR Articles 13 and 14: That the controller shall provide information about the existence of the right to withdraw consent at any time (without affecting the lawfulness of processing based on consent before its withdrawal).

Further details about the requirement: Under GDPR Article 7 (3) it shall be as easy to withdraw as to give consent. This means that the controller must inform the data subject about how consent can be withdrawn.

In addition, it must be assumed that the information must otherwise be provided in a way that makes the right to withdraw consent genuine.

MyHeritage's documentation: The final paragraph under the section "*Legal grounds for the processing of personal information*" in MyHeritage's privacy policy states that "[where] the basis of processing is your consent, you have the right to withdraw your consent, and therefore prevent that processing, at any time". The documentation is clear on this point that such a right exists. There are also a number of references to the data subjects' right and option to withdraw consent in various contexts.

However, as mentioned in section 4.3.2.3, the problem with the documentation is that it is very difficult for the data subjects to obtain an exhaustive overview of which processing operations are processed by virtue of consent and which are processed by virtue of other processing grounds.

MyHeritage also "obtains" a number of invalid consents for processing personal data in its terms of use, e.g. under the section DNA services, which states that:

"By submitting DNA samples to MyHeritage, you give permission to MyHeritage to directly or indirectly extract the DNA from the samples, perform genetic analysis on the DNA using methods available now and developed in the future, to disclose the results of the tests performed by way of providing the respective DNA Reports to you and, solely with respect to the DNA Genealogy Reports, also to others that you authorize, and to store the samples for additional genetic testing (i.e., we may be able to provide more detailed and accurate DNA Results, DNA Reports and other outputs by additional genetic testing in the future, subject to your explicit approval) and to allow you to download the DNA Results, in each and every case subject to and in accordance with this agreement and with the privacy policy."

The same is the case under the section "*To provide the Service*" in the privacy policy, the second paragraph of which states:

"By providing us with personal information, you acknowledge the transfer of personal information to and in the United States and to the processing of personal information in the United States. You accept that the DNA samples will be stored in the United States as provided in the Terms and Conditions".

Our assessment: We believe MyHeritage's documentation only partially meets this information requirement, all the while the right to withdraw consent becomes partially illusory without clear information on what processing operations are actually performed by virtue of (valid) consent.

4.3.2.10 *The right to lodge a complaint with a supervisory authority*

Requirements under GDPR Articles 13 and 14: That the controller provide information about the right to lodge a complaint with a supervisory authority.

MyHeritage's documentation: As far as we can see, MyHeritage's documentation contains no reference to the data subjects' right to lodge a complaint about the company with supervisory authorities.

Our assessment: In our opinion, MyHeritage's documentation does not meet this information requirement.

4.3.2.11 *Information about whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, etc.*

Requirements under GDPR Articles 13 and 14: That the controller provide information whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data.

Our assessment: MyHeritage's documentation contains a number of direct and indirect references to statutory and contractual requirements to provide personal data, but it is difficult to assess whether the information obligation in this regard is fulfilled without undertaking a detailed assessment of the service itself and relevant statutory regulation thereof. As this falls outside the mandate of the memorandum, we find no grounds to make a conclusion on this point.

4.3.2.12 *The existence of automated decision-making (profiling) and relevant information, etc.*

Requirements under GDPR Articles 13 and 14: That the controller provide information on the existence of automated decision-making, including profiling, and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

MyHeritage's documentation: It falls outside the scope of this memorandum to assess whether and to what extent MyHeritage undertakes automatic decision-making, including profiling. However, it is clear that this occurs to a certain extent, such as in connection with the Smart Matching and DNA Matching services. Both services are featured under separate headings in MyHeritage's privacy policy, which provides simple explanations of what the services do and potential practical consequences of using the services.

Our assessment: For the Smart Matching and DNA Matching services, it appears to us that MyHeritage's documentation provides sufficient information about the significance and expected consequences of the automatic decision-making the services entail, but no conclusion in this respect can be made without an assessment of what the services actually entail. Since it falls outside the scope of this memorandum to assess whether and to what extent MyHeritage undertakes automatic decision-making, including profiling, we therefore lack the grounds to make a conclusion on this point. However, we can mention that the description of the underlying logic behind the aforementioned services appears to be inadequate, since the services are mainly described based on their functionality and not their internal logic.

4.3.2.13 *External sources for the collection of personal data about the data subject, etc.*

Requirements under GDPR Article 14: That the controller – if information about the data subject is obtained from someone other than the data subject himself – discloses the categories of personal data concerned and from which source the personal data originate and, if applicable, whether it came from publicly available sources.

Further details about the requirement: The purpose of the provision must be deemed to be that the data subject must be able to determine and assess the source of personal data that is processed, e.g. whether the source has a legal basis for disclosing personal data and whether the data subject wishes to exercise his rights towards the source. In this regard, the Article 29 Working Party has stated that the sources should be specifically named unless this is impossible, and a minimum requirement must nevertheless be that the nature of the source is given (e.g. whether it is a public or private source and the type of organisation/industry/sector).⁷⁴

MyHeritage's documentation: MyHeritage's documentation states in several places that the company collects information from others than the data subjects themselves. An example of this can be found under the heading "*MyHeritage family sites*", which states that "Living people may also be found on the Website in public records (e.g. the 1940 United States Federal Census collection), and in these cases they are allowed by applicable laws. Living people who are well-known celebrities (e.g. presidents, movie stars) can be found on the Website inside the Geni.com collection".

Another example is under the heading "*Information from Public and Historical Records*", where the company states that it "collects historical records from various sources, birth, marriage and death certificates, census records, immigration lists, newspapers and other records, which may contain personal information relating

⁷⁴ Guidelines on transparency under Regulation 2016/679, WP260 rev.01, see the annex to the guidelines.

to you".⁷⁵ In addition, it is clear from MyHeritage's documentation that the company receives information about the data subjects from other users, since listing of family members is a key part of the service's purpose and functionality.

Our assessment: We believe that MyHeritage's documentation does not meet this information requirement for the above examples, all the while only broad categories of sources are provided without any specification enabling the data subject to assess where the information is obtained from. However, this assessment is based solely on an assessment of the aforementioned documentation, and it cannot be excluded that further specification is given by actual use of the service. Although privacy information should, as a general rule, be gathered in one place, we believe that this information requirement can be met if MyHeritage specifies within the service itself (e.g. in users' profiles) where various "external" information is obtained. This will also be the case for information obtained from other users; we do not have have information on how such information is presented within the service either.

4.4 The lawfulness principle and privacy by design

4.4.1 Introduction

The lawfulness principle in Article 5 of the GDPR means that there must be a legal basis for processing the data subjects' personal data. Such powers are specified in Article 6 of the GDPR (which stipulates the grounds for processing ordinary personal data), Article 9 (on the processing of special categories of personal data) and Article 10 (on the processing of personal data relating to criminal convictions and offences).

Reference is made to section 4.3 above where we pointed out some potential problems with GDPR Article 6. Based on MyHeritage's documentation, it is not certain that MyHeritage meets the requirements GDPR Article 6 no. 1 (f) stipulates for legitimate interests as a lawful basis for processing.

Another problem is that it does not appear that MyHeritage itself perceives that the terms of use constitute an "agreement" as the legal basis for processing under GDPR Article 6 no. 1 (b). The terms of use appear to emphasise "consent" from the data subjects as the legal basis for processing under GDPR Article 6 no. 1 (a). Based on MyHeritage's documentation, it is not certain that MyHeritage meets the requirements for consent stipulated by GDPR Article 6 no. 1 (a), cf. Article 7.

In this section 4.4, our assessment is limited to some other comments related to the legal basis for processing.

4.4.2 Processing of special categories of personal data

GDPR Article 9 no. 1 provides for a general prohibition against the processing of personal data concerning "racial or ethnic origin [...], and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation". This prohibition does not apply if one of the conditions of GDPR no. 2 is met, e.g. if the data subject has expressly consented to the processing of such personal data for one or more specific purposes.⁷⁶

Since Article 9 explicitly states that information concerning "racial or ethnic origin", "genetic information" and "data concerning health" is governed by the provision, it is clear that MyHeritage processes so-called "special categories of personal data" to a large extent. In order for this processing to be legal, MyHeritage must have a valid consent from the data subjects (or other grounds mentioned in Article 9 no. 2). It is therefore not enough that MyHeritage has a legal basis for processing under GDPR Article 6 since MyHeritage processes "special categories of personal data".

A closer assessment of the legality of MyHeritage's processing of special categories of personal data falls outside the scope of the memorandum. We would like to point out that consents embedded in general terms

⁷⁵ Text in English, including in the Norwegian privacy policy.

⁷⁶ GDPR Article 9 no. 2 (a).

such as terms of use, will not be valid. User settings that are preset to "yes" or "on" will rather be considered a valid consent according to the GDPR, even if the data subjects are informed that such settings can be turned off.

From what we can see, MyHeritage largely relies on consent as the legal basis for processing personal data, including for special categories of personal data. An example of this is that so-called *"DNA-treff" / "DNA Matching"* is enabled as a default for all users. This means, from our understanding of how the service functions, that users of the service who share DNA are automatically informed about each other after a DNA sample is submitted. Another default setting of the service is that users of DNA-treff/Matching receive information about each other's "ethnicity estimate" and the shared DNA segments. These functions obviously involve the processing of "special categories of personal data", and therefore require explicit consent (or other grounds provided for in Article 9 no. 2 of the GDPR).

Based on our review of MyHeritage's documentation, we cannot see that MyHeritage has obtained valid consent for the processing of special categories of personal data as mentioned above. We also cannot see that MyHeritage has disclosed any other legal basis required for such processing operations (GDPR Article 9 is not mentioned in MyHeritage's documentation).

If MyHeritage has not obtained valid consent for processing of special categories of personal data (or has other grounds as mentioned in GDPR Article 9), neither MyHeritage nor its affiliates (cloud service providers, laboratories, etc.) have legal grounds to process genetic or other health-related information about its users. We must make a reservation here that we have not completed the registration process for the service, and therefore do not know whether valid consents are obtained in that process. It is also possible that MyHeritage's affiliates (cloud service providers, laboratories, etc.) have legal processing grounds in the form of a valid data processor agreement (must meet the minimum GDPR requirements).

4.4.3 The principle of privacy by design

We also point out that GDPR Article 25 no. 2 imposes an obligation on the controller to "implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed".

The provision expresses the principle of privacy by design, which means that the privacy settings in solutions that process personal data must be preset in a privacy protection-friendly way.

Based on the documentation we have reviewed, it appears to us that MyHeritage's service does not comply with the principle of privacy by design in GDPR Article 25. Privacy definitions state that upon initial use all settings are turned on (enabled) so that the data subject must personally turn off functionality if some services are not to be performed by MyHeritage and its affiliates. Since the data subject does not have to perform an active act in order for such services to be enabled, there is a high risk that MyHeritage does not meet the GDPR's strict consent requirements.

4.4.4 Transfer of personal data outside the EU/EEA

As discussed in section 4.3.2.6 above, MyHeritage's documentation clearly states that use of the company's service involves transfer to the United States and potentially also a number of other countries outside the EU/EEA – so-called "third countries". It is also clear that this applies to transfers of "special categories of personal data" to a large extent.

When transferring personal data to third countries, one of the grounds for transfer in Chapter V of the GDPR must be used for the transfer to be lawful. An example of a valid transfer basis that MyHeritage could have used is the EU's standard privacy protection provisions adopted by the European Commission (called the EU's Standard Contractual Clauses). If MyHeritage has entered into data processing agreements based on the EU's Standard Contractual Clauses with companies outside the EU/EEA, the transfers may be lawful.

We cannot see any references in MyHeritage's documentation concerning the grounds for transfer they have used for transfers outside the EU/EEA. The only grounds MyHeritage apparently claims for such

transfers is the consent of the data subjects. If this is the case, MyHeritage will have no legal basis for transferring personal data to affiliates outside the EU/EEA. Consent alone cannot constitute a legal basis for such transfers. We must make a reservation that we have not completed the registration process for the service, and therefore do not know if valid grounds for transfer are disclosed in that process.