

# COMPLAINT TO THE DATATILSYNET UNDER ARTICLE 77(1) OF THE EUROPEAN GENERAL DATA PROTECTION REGULATION<sup>1</sup>

## A. INTRODUCTION

1. Forbrukerrådet(org.nr. 871033382), by Gro Mette Moen – *Fred Olsens gate 1, 0152 Oslo* has been instructed by [REDACTED] (“the complainant”) to file this complaint on her behalf, on the basis of Article 80(1) of the GDPR.
2. This complaint is filed against Google LLC (“Google”), Amphitheatre Parkway, Mountain View, CA 94043 USA.
3. The complainant wishes to raise concerns regarding the way Google processes her location data. The complainant owns and uses an Android smartphone on a daily basis (Huawei P20 Pro 128GB) The device is associated to her Google user account.
4. The complainant requests that Datatilsynet fully investigates this complaint to determine whether Google complies with the requirements laid down in the GDPR, notably with regards to Articles 5, 6, 7, 12, 13 and 25. The concrete action sought from Datatilsynet is detailed at Section D below.

## B. FACTS

5. Location data can reveal a lot about a person: real time movements, frequently visited places, daily routines, interests, etc. Constant location tracking and aggregation of location data over time can be used to build very detailed profiles of individuals and to infer religious beliefs, political leanings, and sexual orientation, among other things.
6. Google’s business model relies almost exclusively on targeted advertising. For this purpose, Google collects significant amounts of personal data about its users, including precise location data. Through its wide range of services, Google builds comprehensive profiles of its users and uses the personal data it gathers to offer targeted advertising services.
7. Users of Android devices, such as the complainant, must create a Google Account before they can access the Google Play app store, which is required to download new apps, or to receive app updates. Additionally, when setting up an Android device for the first time, users must agree to Google’s privacy policy and terms and conditions. This entails that users must agree to Google processing user data collected through the Android device, such as device ID, usage data, and location data.
8. Research<sup>2</sup> shows that Google uses a variety of techniques to push or trick its users into being tracked when they use Google services. These techniques include withholding or hiding information, deceptive design practices, and bundling of services.
9. Google continuously tracks the location of its users through several different technologies. This tracking is notably implemented and enabled via geolocation on Android-powered mobile devices and through the features “Location History” and “Web & App Activity”. These

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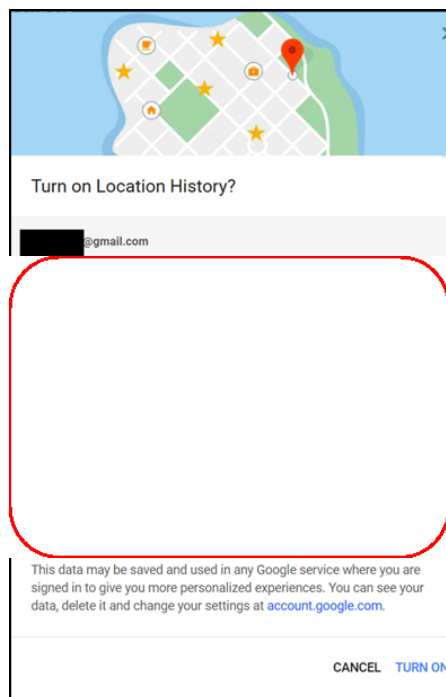
<sup>1</sup> Regulation (EU) 269/2016

<sup>2</sup> Appendix 1: “Every Step You Take: How deceptive design lets Google track users 24/7”, Forbrukerradet, November 2018

two features are integrated into all Google accounts as a “personalisation feature” and are also used to facilitate targeted advertising.

### Location History

10. Location History is a Google account feature that continuously logs the location of the user. According to the information provided by Google, Location History *“helps you get better results and recommendations on Google products. For example, you can see recommendations based on places you've visited with signed-in devices, or traffic predictions for your daily commute.”*<sup>3</sup> The location data collected through Location History is derived from GPS, Wi-Fi scanning, and Bluetooth scanning, which means that Google can track a user’s precise location inside buildings as well as outside.
11. According to the description on Google’s “My Account” website and the information given during the Google Account set up process in Android devices, data collected through Location History is also used to serve targeted advertising:  
*“This data helps Google give you more personalized experiences across Google services, like a map of where you've been, tips about your commute, recommendations based on places you've visited, and useful ads, both on and off Google.”*<sup>4</sup>



Screenshot: Location History information from a Google account, as seen on a web browser on a PC.<sup>5</sup>

12. When enabled, Location History collects a variety of user data, including mode of transportation (walking, driving, on a tram, entering a vehicle, etc.), barometric pressure

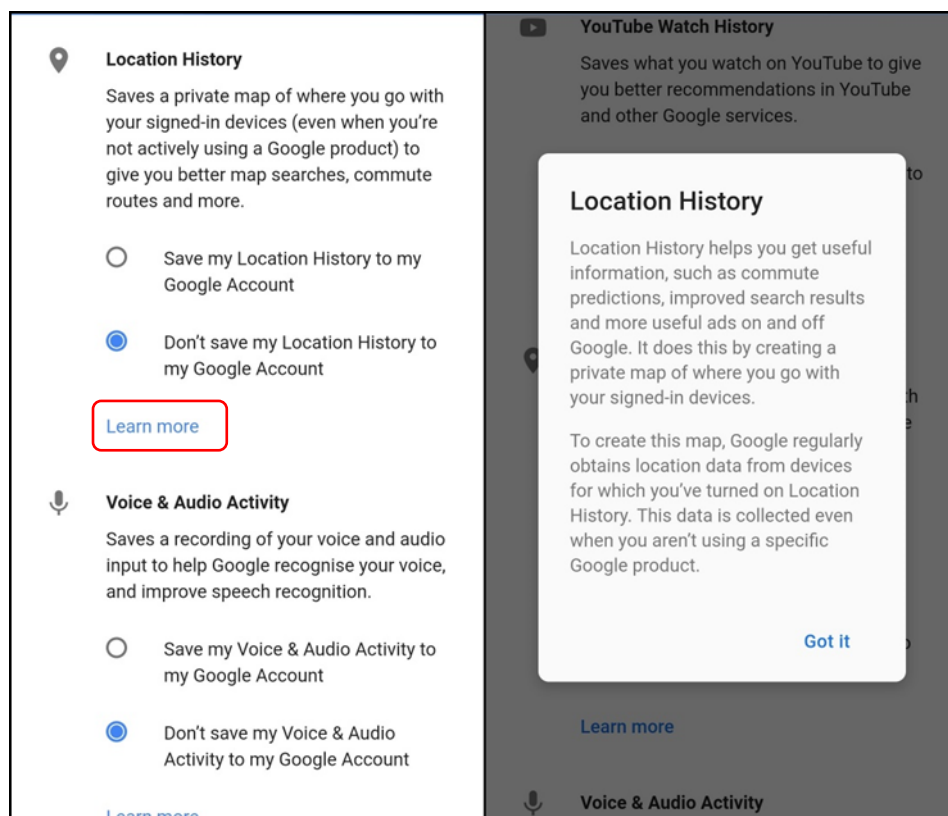
<sup>3</sup> “Google Account Help - Manage or delete your Location History”  
<https://web.archive.org/web/20181002223705/https://support.google.com/accounts/answer/3118687?hl=en>  
(Accessed and archived 02.10.18)

<sup>4</sup> “Google Activity Controls” <https://myaccount.google.com/activitycontrols> (Accessed 22.11.18) (Must have an Google account to access the link.)

<sup>5</sup> All the screenshots in this complaint were taken in July and August 2018.

(altitude), Wi-Fi information, GPS coordinates, and the battery level of your device. This data is transmitted to Google and stored as a part of the user's Google account.

13. Some of the information inferred through this data collection (location, route, mode of transportation, which shop you visited at what time) is available on the user account ("Location History Timeline"), where users can look through their movement history for the period the feature has been enabled.<sup>6</sup> Other data, for instance about barometric pressure, nearby Wi-Fi hotspots and Bluetooth beacons, and battery level, is not visible to the user, but is collected passively in the background.
14. According to Google, the Location History feature is voluntary, and users must opt in before the feature starts tracking user location.<sup>7</sup> However, research shows<sup>8</sup> that Google uses different means to nudge the user into turning on this feature and it can also be easily turned on involuntarily as, for example, enabling other services like Google Assistant also entails turning on Location History.
15. As shown in the screenshot below, taken on an Android device, during the Google account set-up process there is no clear direct indication that the data collected via Location History is also used for advertising purposes "*on and off Google*". This information is not disclosed unless the user proactively seeks to find out more information by clicking "Learn more".



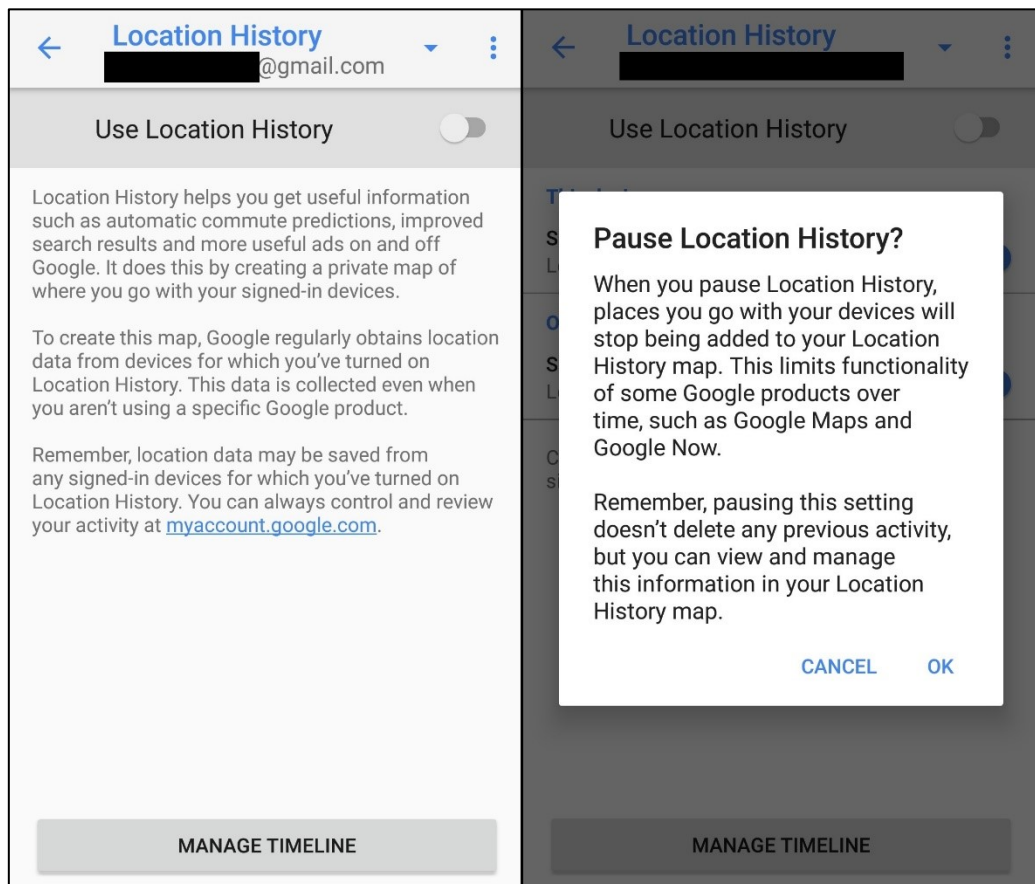
16. There is no real option to turn off Location History once it has been enabled; users can only pause it after the Google account has been created. Users who attempt to 'pause' location history, receive vague warnings that this will limit some functionalities. Moreover, the

<sup>6</sup> "Google Timeline" <https://www.google.com/maps/timeline?pb> (Accessed 22.11.18)

<sup>7</sup> "Google privacy policy – How do I know if my Location History is on?" <https://policies.google.com/technologies/location-data#is-on> (Accessed 22.11.18)

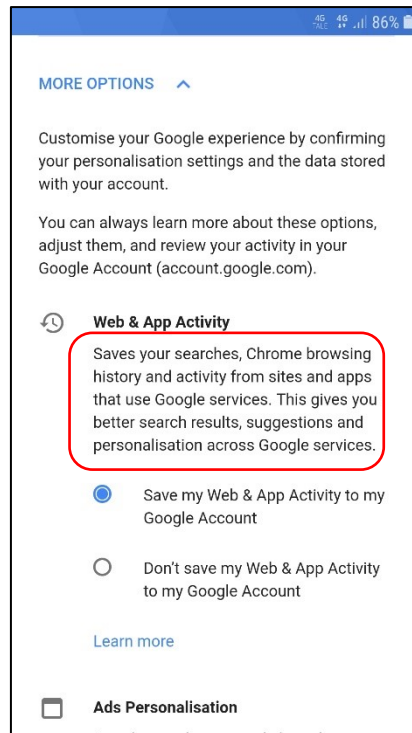
<sup>8</sup> See Appendix I, Section 4.3 of the report.

process of deleting historical location data is separate from pausing Location History, and Location History data is seemingly retained indefinitely if the user does not manually delete it.

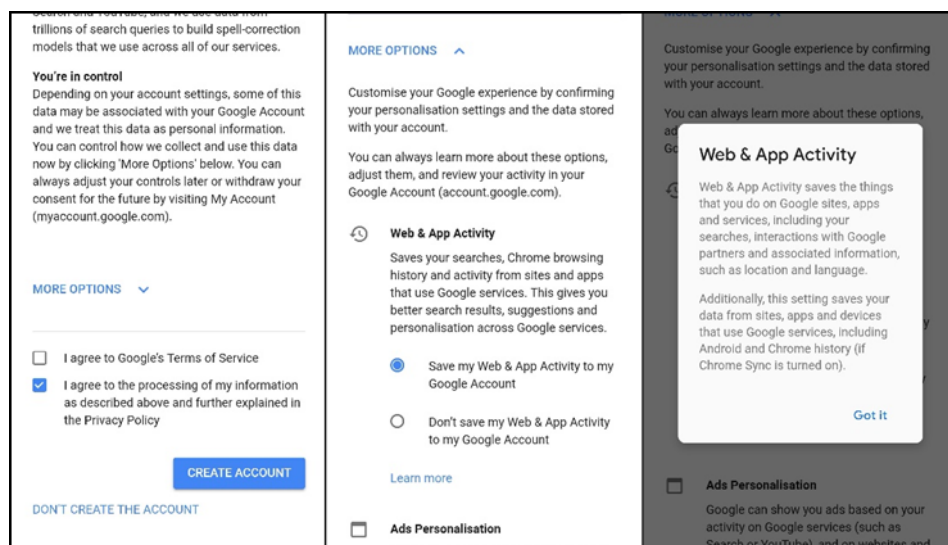


### Web and App Activity

17. Web & App Activity is another Google account feature, which collects different user data from a variety of Google services. As seen below, during the Google account setup, Web & App Activity is described as *“Saves your searches, Chrome browsing history and activity from sites and apps that use Google services. This gives you better search results, suggestions and personalisation across Google services”*.

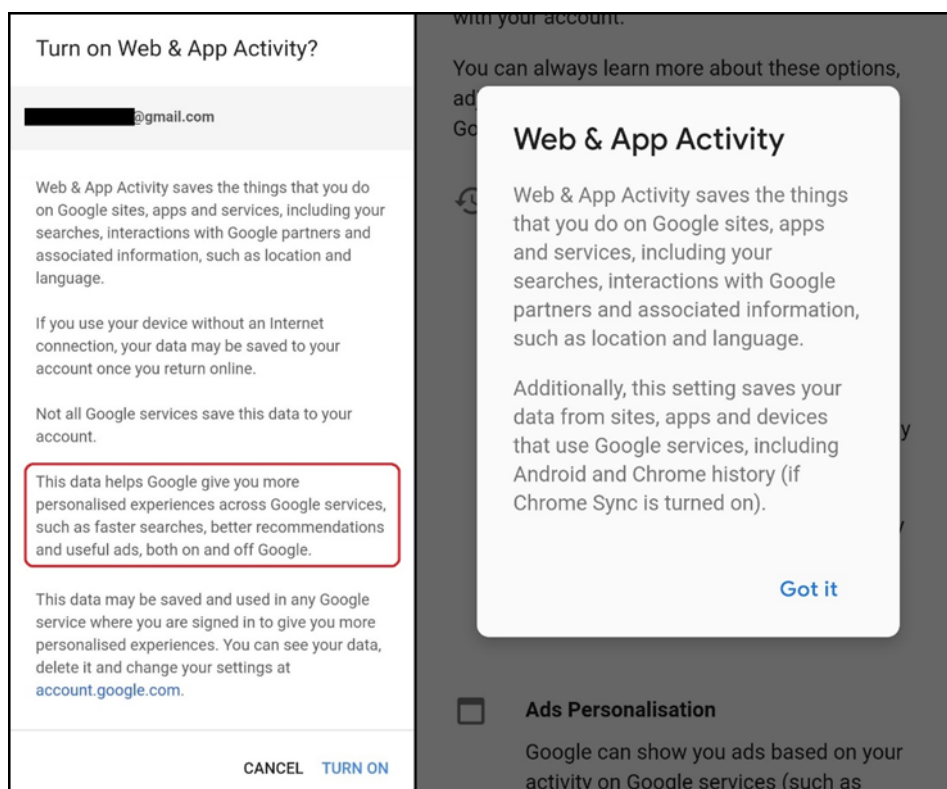


18. Google users can look at the data collected through Web & App Activity through the “My Activity” timeline on their profile, which is logged separately from the Location History Timeline.<sup>9</sup> This log includes timestamped records and location data related to which apps they have used on their Android device.
19. Although most apps do not record the user’s location through Web & App Activity, certain apps and services, such as Google searches and searches made through Google Maps, are logged with location data of where the user was when they performed the search.
20. As shown in the screenshot below, when setting up a Google account on an Android phone, unless the user first clicks “More options”, and then “Learn more”, it is not clear that location data is collected via the Web & App Activity feature.



<sup>9</sup> “Google – My Activity” <https://myactivity.google.com/myactivity> (Accessed 22.11.18)

21. Web & App Activity is enabled by default when setting up a Google account. The data collected through this feature is also used to personalise advertising, but this information is not always clearly communicated to the user, as shown in the screenshot below.



*Information about Web & App Activity: In the Google account settings on an Android phone if user attempts to reactivate feature after having switched it off (left), and during the initial setup process (right).*

22. As with Location History, it is not possible to turn off Web & App Activity but only to pause it and, if the user attempts to do this, he receives a vague warning that this will limit or disable functionality. This non-extensive list includes “you may stop seeing more relevant search results or recommendations that you care about”.

### **Google’s privacy policy and terms of service.**

23. To create and use a Google account, the user has to agree to Google’s privacy policy (Appendix II) and terms of service (Appendix III). The terms of service include the privacy policy as part of the contract.
24. The privacy policy and terms of service do not provide clear information about which legal basis is used for processing location data and for what purposes. Google lists four legal bases out of the six included in Article 6 of the GDPR (consent, legitimate interest, provision of a service and legal obligations) with some examples for each legal ground<sup>10</sup>. The privacy policy states, for example, that Google asks for consent to provide the user with personalised services like ads (suggesting that Google invokes article 6(1)(a) GDPR) – but Google also lists

<sup>10</sup> See Google Privacy Policy: “Compliance and cooperation with Regulators – European Requirements”. See Appendix II.

advertising under legitimate interests (article 6(1)(f) GDPR). Therefore, it is unclear which legal basis Google invokes for personalised advertising (behavioural targeting). Information about which legal basis is used for which purposes, as required by Articles 13 and 14 of the GDPR, is in our opinion not sufficiently specific and clear. This information is not given to the data subject during the Google account setting process neither.

### **C. LEGAL CONSIDERATIONS**

25. Location data can directly or indirectly identify a natural person and therefore constitutes personal data in the sense of Article 4(1) of the GDPR. This means that Google are collecting personal data when they collect and store information about a person's location and movements through "Location history" and "Web & App activity".
26. The processing of this personal data is only lawful if Google relies on one of the six legal bases for processing established in Article 6 of the GDPR. The first step is to determine which legal basis is used and for which purpose. All this has to be clearly communicated to the data subject according to the GDPR.
27. As outlined in point 24, it is not clear from the information that Google provides to the user which legal grounds applies to which processing operations. This first of all raises concerns as to Google's compliance with the information and transparency obligations it is subject to under the GDPR. This concern had in fact already been raised by the Article 29 Working Party when Google merged the privacy policy of all its services back in 2012.<sup>11</sup> Nevertheless, Google has not changed its approach and continues to provide unclear and incomplete information to users, even after the entry into force of the GDPR and the consequent update of its privacy policy.
28. For the purposes of this complaint, we preliminary assume that Google is relying on consent<sup>12</sup> as the legal basis for processing location data for all purposes related to the Location History feature, given that this feature depends on users opting in. With regards to the Web & App Activity feature, things are less clear. It may be that Google relies on consent for some of the purposes grouped under this feature. However, the fact that this feature is turned on by default would suggest that Google is 'forcing' users to consent or that Google is relying on a different legal ground for processing, namely legitimate interests.<sup>13</sup>
29. This complaint therefore focuses on the processing operations involving location data for the purposes related to the Location History and Web & App Activity features which are based on consent or legitimate interests as a legal basis. Our concerns particularly relate to the use of location data for profiling and advertising purposes.
30. Which legal basis is used by the controller for which purposes, as well as the lawfulness of their use, will ultimately have to be determined in the course of this procedure. Nothing in

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<sup>11</sup> [https://www.cnil.fr/sites/default/files/typo/document/GOOGLE\\_PRIVACY\\_POLICY-RECOMMENDATIONS-FINAL-EN.pdf](https://www.cnil.fr/sites/default/files/typo/document/GOOGLE_PRIVACY_POLICY-RECOMMENDATIONS-FINAL-EN.pdf)

<sup>12</sup> Article 6.1 (a) GDPR

<sup>13</sup> Article 6.1 (f) GDPR



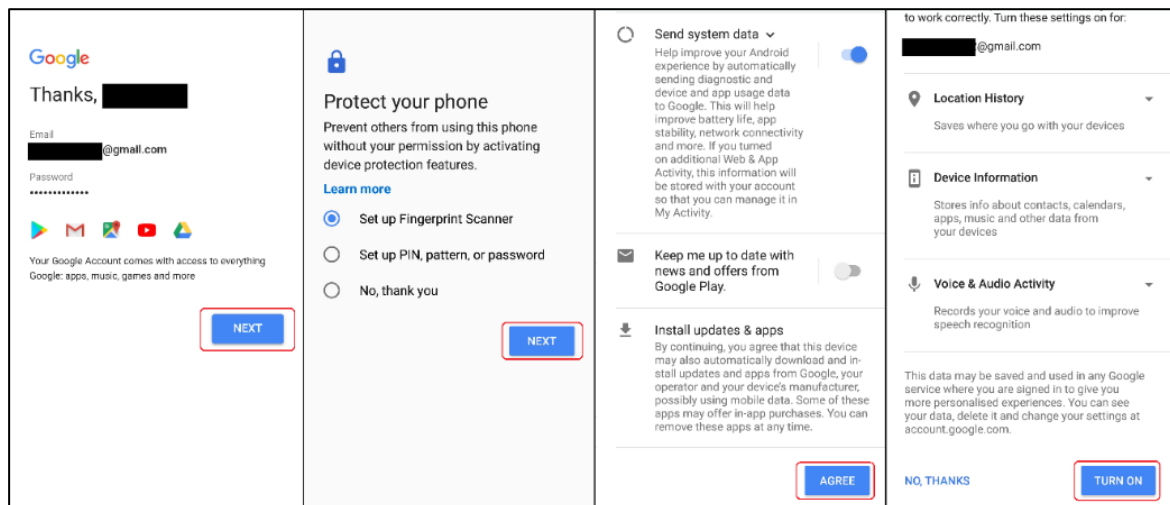
this complaint shall preclude that other legal basis the controller might be relying on could be unlawful or be subject to further legal actions subsequently.

### **Lack of valid consent for processing location data in the framework of the “Location History” feature**

31. Consent is defined in the GDPR as “any freely given, specific, informed and unambiguous indication” by a “statement” or by “clear affirmative action” from the data subject.<sup>14</sup> All of these conditions need to be fulfilled for consent to be considered valid.

#### *Freely given*

32. The data subject must be provided with a real choice about whether to give consent or not. Consent is not freely given if there is “any element of compulsion, pressure or inability”.<sup>15</sup>
33. Google gives users the possibility to opt in or not into to Location History.<sup>16</sup> Therefore, in principle, if users do decide to opt-in into this feature this should be considered ‘freely given’ consent for their data to be processed for the purposes indicated by Google. However, there are several elements that demonstrate that this is not the case.
34. As the screenshot below shows, the setup process of a Google account in Android devices seems clearly designed to make users consent to Google processing their location data, simply by naturally following the click-flow.



35. There is no granularity when it comes to the processing purposes entailed by the Location History feature. Based on the information provided during the account set up process when users are prompted to turn on the feature, at first the purpose simply seems to be to save information about where the user goes with his devices. When seeking more information about this feature, the user is told that the location data collected is used for the purpose of helping Google give the user more personalised experiences across the company’s services.

<sup>14</sup> Article 4.11 GDPR

<sup>15</sup> Working Party 29 “Guidelines on Consent under Regulation 2016/679” p. 7

[http://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=623051](http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051)

<sup>16</sup> “Google privacy policy” <https://policies.google.com/technologies/location-data#is-on> (Accessed 22.11.18)



Google then illustrates examples of what it considers to be part of these “more personalised experiences”, namely: a map of where the user has been, tips about his commute, recommendations based on places that the user has visited and useful ads, on and off Google.<sup>17</sup>

36. In our opinion, there are several issues with this approach. Firstly, Google is not giving clear information about the purpose of this feature. At first it seems the purpose is to save a map of visited places. However, if the user digs deeper it turns out the purpose is to personalise the experience across Google’s services and this means many things including the use of data for ads. Secondly, if the defined purpose of processing is to personalise the experience of the user, this is too broad and vague. And thirdly, at least some of the examples listed by Google should constitute separate individual purposes in themselves. Nevertheless, the user has no freedom but to consent to all of them if she wishes to switch on the feature. For example, if she effectively wants Google to save a map of where she’s been, she must also accept the use of her location data for other purposes, including advertising.
37. Android users are nudged toward enabling Location History at several occasions if they have not switched it on during the setup process. Users that do not enable Location History when setting up their accounts must decline the activation of the setting at least four times when using different services that are preinstalled on Android phones; in Google Assistant, Google Maps, Google Search App, and Google Photos.
38. Moreover, if for example, the user simply wants to have his photos sorted by location, she is forced to consent to switching on the Location History feature. As explained before, this entails much more than geotagging photos. In practice this means that users that want their photos grouped by location can only receive this feature by opting in to full scale location tracking of all their movements by Google and allowing the use of their location data for advertising purposes. The user is presented with a bundled “take it or leave it” option where there is no real choice. The scenario is similar if the user wants to use Google Assistant.
39. Information provided to the user at different stages is biased towards highlighting the benefits of enabling Location History and the negative consequences of not having it on. This compels the user to give her consent and turn on the feature. For example, the user is not informed up front about the use of the data gathered through this feature for advertising purposes. Also, if the user attempts to disable the feature, she is shown vague warnings about reduced functionality. This indicates that there would be a clear disadvantage for those withdrawing consent (therefore it cannot be withdrawn without detriment) and normally should discourage the user from turning off the feature.
40. In summary, firstly, the user is repeatedly compelled to give consent using design patterns and biased notices, *de facto* forcing him to give such consent in the end. She is also discouraged from withdrawing consent. Secondly, the purpose(s) of processing are not properly clear. The controller conflates several purposes for processing under Location History and does not attempt to seek separate consent for each purpose. Thirdly, in certain instances, access to specific features or services different from Location History is made conditional on enabling this feature and thus giving consent to much broader and invasive

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<sup>17</sup> See screenshot on page 6.

data processing which is not necessary for the performance of those different services or features.

41. Moreover, consent is not a valid legal ground for processing of personal data where there is a clear imbalance between the data subject and the controller.<sup>18</sup> In cases where the controller is in a dominant position, it is likely to affect the voluntariness of the data subjects' "freely given" consent. In this situation, there is a clear imbalance of power between Google and the user. Google is clearly in a dominant position when 85% of global smart phones are running on the Android operating system, which is a Google product.<sup>19</sup>
42. Taking into account these elements, Art. 4(11), Art 5.1(a), Art. 5.1(b), Art. 6.1(a), Art. 7 and Art 12.1 and Art. 13.1(c) of the GDPR, and the guidance of the Article 29 Working Party<sup>20</sup>, we consider that consent given under these circumstances cannot be deemed as "freely given" and is therefore invalid. Any processing operations in the context of Location History based on such consent, in particular those related to advertising purposes, breach the GDPR.
43. We consider that the lack of valid consent for the purposes of the Location History feature can be determined on the element of "freely" given consent alone. However, should Datatilsynet (contrary to the arguments above) take the view that the controller did obtain "freely given" consent, the complainant relies on the following additional grounds to illustrate that the rest of conditions required for consent to be valid are not met neither.

#### *Specific and informed*

44. According Article 6(1)(a) of the GDPR the consent of the data subject must be given in relation to "one or more specific" purposes and the data subject shall have a choice in relation to each of them.
45. In the case of Location History, the stated data processing purposes are in rather blurry, as explained in point 35. First of all, what appears to be the main purpose "provide more personalised experiences" is not specific enough. Moreover, other mentioned purposes (e.g. create a map, relevant advertising on and off Google) are presented as a 'non-exhaustive' list of examples of 'personalisation', rather than separate purposes. Lastly, there is no granularity, the user is prompted to consent to at the same time for example to the creation of a map of visited places and the use of the same data for advertising purposes.
46. Consent must also be "informed" to be considered valid. The principle of transparency is one of the basic principles of the GDPR.<sup>21</sup> This means that the user must be presented with any information that is necessary to understand what they are consenting to, and that it should be clear what the consequences of giving consent could be.
47. When setting up a Google account, users are told that they can control how Google collects and use their data. Users are also informed that they can adjust the settings and withdraw their consent.

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<sup>18</sup> Recital 43 GDPR

<sup>19</sup> "Smartphone OS market share" <https://www.idc.com/promo/smartphone-market-share/os> (Accessed 22.11.18)

<sup>20</sup> Working Party 29 "Guidelines on Consent under Regulation 2016/679" p. 7

<sup>21</sup> Article 5.1(a) GDPR

**You're in control**

Depending on your account settings, some of this data may be associated with your Google Account and we treat this data as personal information. You can control how we collect and use this data now by clicking 'More Options' below. You can always adjust your controls later or withdraw your consent for the future by visiting My Account (myaccount.google.com).

[MORE OPTIONS](#) ▼

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☐ I agree to Google's Terms of Service
   
☒ I agree to the processing of my information as described above and further explained in the Privacy Policy

[CREATE ACCOUNT](#)

[DON'T CREATE THE ACCOUNT](#)

48. However, the way that this information is presented to users by Google often does not meet the standards required by the GDPR. This is particularly clear in relation to Location History. The user has to click “learn more” to get important information about the purposes of the processing, and the choices she has. The relevant information regarding what Location History actually entails is hidden behind extra clicks and submenus, and the information about what the data is used for is ambiguous and unclear. Furthermore, the use of phrases such as “private map” mislead the user. What does ‘private’ mean in this context, when Google has access to all the data and can use it for other purposes beyond the creation of the map?

**Location History**

Saves a private map of where you go with your signed-in devices (even when you're not actively using a Google product) to give you better map searches, commute routes and more.

☐ Save my Location History to my Google Account
   
☒ Don't save my Location History to my Google Account

[Learn more](#)

49. Even if the complainant finds and reads the information under “Learn more”, she will probably not understand to what extent their location data is processed, and how it is used for advertising purposes on and off Google. For example, when using a service such as Google Assistant, it may not be obvious for the user that location data is being collected and stored, or for what purposes.

50. For the reasons explained above, we consider that the consent obtained for the purposes of Location History is not 'specific', nor 'informed', contrary to what is required by the GDPR.

### ***Unambiguous***

51. For consent to be valid, the user must have given an "unambiguous indication" through a "clear and affirmative action", that she consents to Google processing his personal data for the purposes communicated by the company. In this case, such purposes notably include advertising, although this is not clear upfront.
52. Google claim that the user must opt in before they can process location data collected through "Location history". However, due to the deceptive design used by Google, it is not entirely clear for the user that she is actually giving consent to something, and even if it was, it is not clear exactly to what she is consenting to. If the user simply follows the click-flow presented by Google, he is "Turning On" a function (Location History) to "save where he goes". If she clicks on "Learn more" she finds out this entails the use of data for other purposes beyond that (including advertising), but as explained before, the list is non-exhaustive and the information is unclear.
53. Therefore, we consider that consent obtained through the account set up process for the purposes entailed by the Location History feature cannot be considered "unambiguous", defined as a clear affirmative action of the wishes of the data subject, as required by the GDPR. The same applies to consent obtained by Google for the purposes of Location History via other services such as Google Photos and Google Assistant, given that the information and choice presented to the data subject are equally flawed.

### **Lack of valid legal basis for processing location data in the framework of the "Web & App activity" feature**

54. As outlined above, the fact that Web & App Activity is turned on by default for Google accounts, seems to indicate that the processing of location data collected through this feature would not be based on consent but on another legal ground. However, Google does not give in its privacy policy, nor during the account set up process, sufficiently specific information as to which legal basis it relies upon for which processing operations. The use of consent as a legal basis cannot be fully ruled out. Therefore, we assess firstly the possibility that Google relies on consent for the processing of location data collected via the Web & App activity feature. Subsequently, we assess the two other legal basis that Google could alternatively be relying upon, notably 'performance of a contract' and 'legitimate interests'.

### ***Consent***

55. Given the sensitivity of location data and that Google uses this data for advertising purposes on and off Google, consent should be the appropriate legal basis for the processing of such data in this situation in our opinion. It is complicated to decipher on which the legal basis Google is relying upon. However, if Google is indeed relying on consent, such consent would not meet the conditions set forth by the GDPR and would therefore not be valid.

56. Notably, the Web & App activity feature is switched on by default in all Google accounts, immediately allowing Google to process personal data for the purposes of this feature. This includes the processing location data which can be used for targeted advertising purposes. The GDPR and guidance issued by the Article 29 Working Party clearly indicate that for consent to be valid, it requires a positive opt-in. Pre-ticked boxes or any other method of consent by default are not to be used. Therefore, the fact alone that the feature is turned on by default should mean that any processing operation linked to Web & App activity relying on consent is infringing the GDPR, as tacit consent does not constitute an indication of the data subject's wishes. Moreover, it is questionable whether the consent is freely given.
57. Moreover, consent for the purposes linked to the Web & App Activity feature would also be invalid for the very same reasons previously outlined in relation to the Location History feature. The design and click-through patterns applied by Google for Web & App Activity and Location History are generally very similar. In addition to not being 'freely given', consent would fail to meet the requirements of being informed, granular, specific and unambiguous.

#### *Performance of a contract*

58. Among the legal basis for lawful processing of personal data under the GDPR, Article 6.1(b) envisages that processing of personal data is lawful if it is "*necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract*".
59. The Article 29 Working Party has clearly indicated that the use of this legal basis for processing personal data must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract, but rather unilaterally imposed on the data subject by the data controller.<sup>22</sup> A controller that relies on this legal basis must be able to show that the processing is genuinely necessary, taking into account whether a less privacy-intrusive method could be used.<sup>23</sup>
60. At no moment Google indicates that the processing of location data carried out in the context of the Web & App Activity feature is necessary for the performance of the service. Moreover, the fact that the complainant can switch off ('pause') this feature would strongly indicate that the data processing is indeed not necessary and therefore Article 6.1 (b) cannot constitute a valid legal basis in this situation.

#### *Legitimate Interests*

61. Since Google cannot be relying on the complainant's consent nor on the necessity for the performance of the contract when processing location data for the purposes linked to the Web & App Activity feature, the only other plausible option is that Google is relying on 'legitimate interests' as per Article 6.1 (f) of the GDPR. This assumption is reinforced by the fact that Google's privacy policy mentions "providing advertising" and "understanding how people use our services to ensure and improve the performance of our services"<sup>24</sup> as part of

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<sup>22</sup> WP29 Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, page 16.

<sup>23</sup> WP29 Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, page 23.

the company's legitimate interests. These stated legitimate interests match some of the purposes for which location data collected under the Web & App activity is seemingly used.

62. If a data controller (in this case Google) is relying on legitimate interests for processing personal data, this must be balanced against the interests, fundamental rights and freedoms of the data subject. It is the controller's responsibility to do this. A legitimate interest must also be "lawful", "sufficiently clearly articulated" and "represent a real and present interest".<sup>25</sup>
63. Article 6.1 (f) can be broken down into three key elements that must be considered by the data controller<sup>26</sup>: purpose, necessity and balancing exercise.
64. Firstly, in terms of the purpose and the actual legitimate interests pursued by Google in this case, the information provided about the purposes and extent of data collection through Web & App Activity is not particularly clear.<sup>27</sup> The fact that location data is collected as a part of this setting is actually hidden behind extra clicks, and information stating that this data may be used for advertising is only available under limited circumstances. Additionally, the fact that Web & App Activity is enabled by default is hidden when setting up a Google account.
65. Furthermore, in the limited contexts where Google actually provides information about the purposes for which the data gathered via Web & App Activity is being used, the description is rather vague and unclear, in particular when it comes to advertising: *"This data helps Google give you more personalised experiences across Google services, such as faster searches, better recommendations, and useful ads, both off and on Google"*.<sup>28</sup> This phrasing is a catchall that permits a wide range of purposes for using Web & App Activity data.
66. Consequently, the legitimate interests pursued by Google do not seem sufficiently well articulated, especially if we are to look only at the information provided during the account set up process on Android devices.
67. Secondly, regarding the necessity of processing, this is hard to assess given the lack of clarity regarding Google's purposes. However, it seems generally possible for Google to continue personalising users' experiences across its services without processing location data. This argument is further supported by the fact that Google gives users the possibility to turn on or off Location services in Android devices, as well as "Location History" and "Web & App Activity" in Google accounts.
68. Lastly, for legitimate interests to be a valid legal ground for processing personal data, Google must have a legitimate interest that overrides the complainant's rights and freedoms. This balancing test must be carried out by the Google itself.<sup>29</sup>

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<sup>25</sup> Article 29 Working Party "Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC" p. 25 and p. 52

<sup>26</sup> See ICO guidance on Legitimate Interests – the three part test <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/legitimate-interests/what-is-the-legitimate-interests-basis/>

<sup>27</sup> See Appendix I, Section 4 of the report.

<sup>28</sup> See screenshot on page 4.

<sup>29</sup> GDPR art. 6 (1)(f) GDPR and recital 47.

69. Several elements must be considered when carrying out such a balancing test: the nature of the interests of the controller, the prejudice suffered by the controller if the processing does not take place, the nature of the data, the status of the data subject, and the way that data is processed. Additionally, the data controller must take into account the fundamental rights and/or interests of the data subject that could be impacted.<sup>30</sup> The interests of the individual could in particular override the legitimate interests of the controller if data is processed in ways the individual does not reasonably expect.<sup>31</sup>
70. Privacy and the right to protection of personal data is a fundamental right in the EU.<sup>32</sup> Therefore, there is a high barrier to set aside the individuals rights and interests in privacy matters.
71. Google state in their privacy policy that they have a legitimate interest to provide “advertising to make many of our services freely available for users”.<sup>33</sup> However, the extensive location tracking performed through Web & App Activity is quite invasive, especially considering that the tracking happens regardless of user interaction, that the collected data is retained on a seemingly indefinite basis and that the data is used for advertising purposes. As a result, the impact of the location data processing enabled by Web & App Activity is quite privacy invasive.
72. The complainant did not have a “reasonable expectation” to believe that Google is tracking her location for marketing purposes in the context of Web & App Activity and that Google is collecting this information since the user created a Google account. Moreover, there are no objective reasons to assume that the complainant had such an expectation. The extent of the collection of personal data for advertising purposes is under-communicated and hidden in the presentation of Web & App activity.<sup>34</sup> In addition, since Web & App activity is turned on by default, the data subject would likely not have seen any information about location data being collected and it is unlikely that she would ever opt out of Web & App activity, since she likely will not know that the setting is turned on. In summary, she will be unaware that location data is collected via this feature, that this data is used for advertising, or even that Web & App Activity exists in the first place.
73. Moreover, European data protection authorities have already stated that “opt-in consent would almost always be required [...] for tracking and profiling for purposes of direct marketing, behavioural advertisement, location-based advertising or tracking-based digital market research”.<sup>35</sup>

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<sup>30</sup> Article 29 Working Party “Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC” p. 55

<sup>31</sup> Recital 47 GDPR.

<sup>32</sup> Art. 8(1) of the Charter of Fundamental Rights of the European Union, art. 16(1) of the treaty on the Functioning of the European Union (TFEU), Art. 1(2) and recital 1 GDPR.

<sup>33</sup> “Google Privacy Policy” <https://policies.google.com/privacy#enforcement> (22.11.18) See Appendix II, section “Compliance & cooperation with regulators”.

<sup>34</sup> See Appendix I, Section 4.2 of the report.

<sup>35</sup> Article 29 Working Party “Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC” p. 47.



74. These considerations support the conclusion that legitimate interests is not a valid legal ground for the processing of location data collected via the Web & App Activity feature, particularly when it comes to the use of such data for advertising purposes.
75. Since consent cannot be considered valid in this situation and Google cannot rely on the necessity for the performance of the contract or legitimate interest neither, we conclude that Google lacks a valid legal basis for processing and is therefore in breach of GDPR.

#### **D. REQUESTS TO DATATILSYNET**

76. We request that Datatilsynet fully investigates the concerns raised in this complaint using all the powers vested in it under Article 58 of the GDPR and, if appropriate and to the extent that cross border data processing might be involved, that it brings up this complaint to the consideration of the European Data Protection Board.
77. In particular, we request that Datatilsynet investigates and determines:
- i. whether Google has a lawful legal basis to process the complainant's location data, particularly for those purposes related to advertising; and whether Google is properly informing the complainant about which legal basis the company uses to process her location data and for which purposes it is doing so,
  - ii. whether the conditions set out in Article 7 of the GDPR for valid consent are met, notably in those cases where Google may rely on consent as a legal basis for processing location data for advertising purposes;
  - iii. whether 'legitimate interests' constitutes an appropriate legal basis for the processing of location data carried out by Google in the context of the processing operations addressed by this complaint, notably in relation to advertising purposes.
  - iv. whether the design patterns and tricks used by Google to push consumers to share location data are compatible with the principles set forth in Articles 5.1 (a) and Article 25 of the GDPR regarding the fairness and transparency of processing and data protection by design and by default.
78. We further request that Datatilsynet requires Google to stop any unlawful processing operations related to the use of location data, notably those operations related to the use of such data for advertising purposes.
79. Finally, we request that Datatilsynet imposes an effective, proportionate and deterrent fine against Google for the infringements of the GDPR, considering:
- o The number of users affected beyond the complainant (potentially anyone with an Android phone and/or a Google account)
  - o That Google is a 'repeat offender' in terms of data protection law infringements
  - o The sensitivity of location data
  - o The financial gains that Google takes from processing personal data for advertising purposes and the dominant market power of the company
  - o That fundamental principles of the GDPR, as well as provisions related to the data subjects' rights, have been infringed