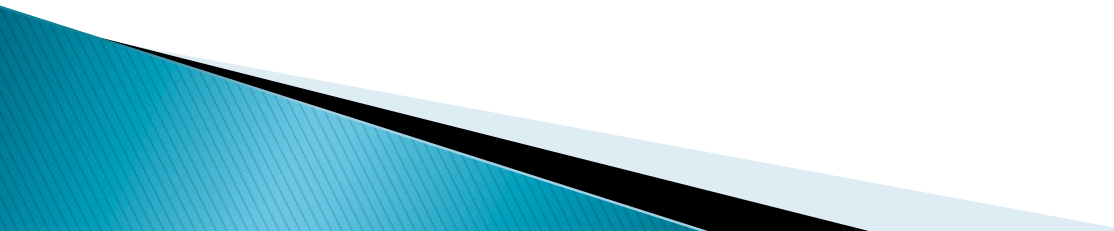


# A Comparative Analysis of the Jurisprudence of the European Court of Justice and the Romanian Constitutional Court on Metadata Retention

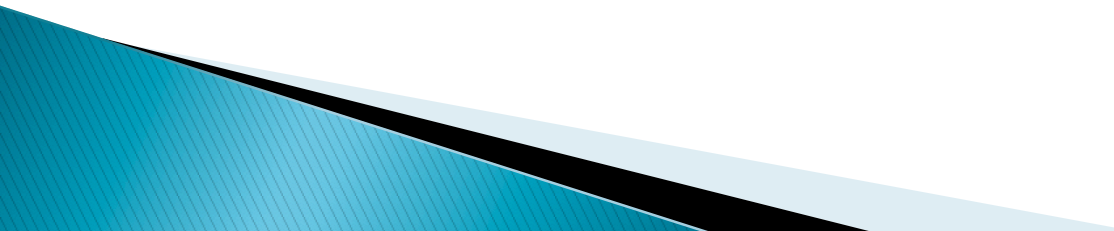
Valentin Stoian, PhD  
“Mihai Viteazul” National Intelligence Academy  
Bruxelles, January 2015



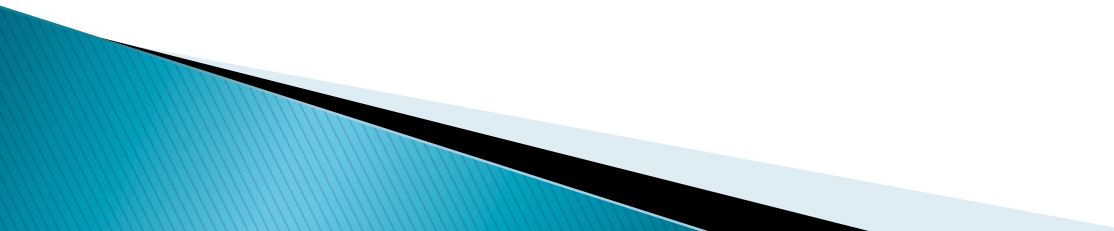
# Aim of the paper

- ▶ To offer a comparison between the European Court of Justice Decision in the case of *Digital Rights Ireland v. Minister of Communications* and the Romanian Constitutional Court Decisions (1258/2009, 440/2014, 461/2014) on the topic of metadata retention
  - ▶ Main conclusion: both courts argue that metadata retention and access requires judicial authorization for individual cases
- 

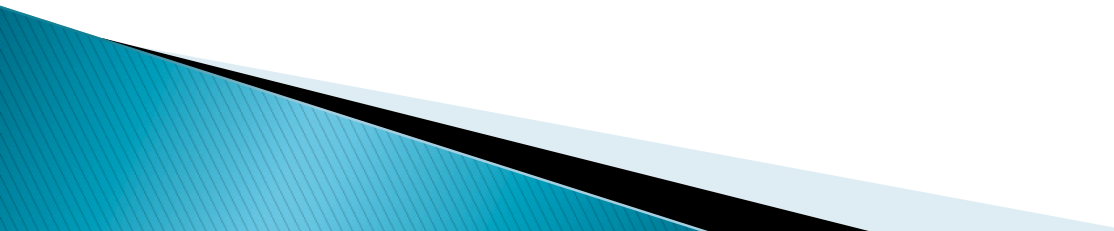
# Directive 2006/24/EC on data retention and the „way to Luxemburg”

- ▶ Directive 2006/24/EC required member states to regulate the retention for up to two years and use metadata generated by public telecommunications (telephone number, time and duration of call, IP address, IMEI) with the purpose of investigating serious crime and terrorism.
  - ▶ The Directive affirmed its compliance with the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.
- 

# Directive 2006/24/EC on data retention and the „way to Luxemburg”

- ▶ The Directive was unsuccessfully challenged on procedural grounds before the ECJ, but national legislation transposing it was deemed unconstitutional in Bulgaria (2008), Germany (2010), Czech Republic (2011), Cyprus (2011).
  - ▶ The German Constitutional Court argued that metadata retention was a disproportional means towards achieving a legitimate goal
- 

# *Digital Rights Ireland* and the Romanian Constitutional Court Decisions

- ▶ ECJ argued that the goal of fighting terrorism is legitimate but that the 1. general character (metadata is retained for all communications, not just for persons liable to be criminally prosecuted) 2. absence the requirement for a court warrant when accessing stored metadata and make the Directive a disproportionate means to the legitimate goal.
  - ▶ Also, the lack of proper guarantees against unauthorized access ( including storing the data in Europe) and the mandatory destruction of data infringe on the guarantees of the right to privacy.
- 

# *Digital Rights Ireland* and the Romanian Constitutional Court Decisions

- ▶ The RCC decision of 2009 argued that the 1. general and continuous character of metadata retention and 2. the lack of a requirement for a court warrant to access the metadata by “authorities entrusted with national security” destroy the very existence of the right to privacy
- ▶ Same argumentation in Decision 440/2014 and Decision 461/2014 on pre-paid cards and identification of users of free wifi, but also adding the fact that proper guarantees against unauthorized access have to be taken
- ▶ RCC rejected making any distinction between law enforcement and “authorities entrusted with national security” and demanded both request court warrants for access

# A comparative assessment

Character of metadata storage and use	Generality (about all persons)/ Indiscriminate	Continuous (long time limits)	Warrantless access by state authorities	No guarantees against unauthorized access
Reasons for invalidation				
Destroys the essence of the right	RCC 1289/2009	RCC 440/2014 RCC 1289/2009	RCC 1289/2009 RCC 440/2014	RCC 461/2014
Is a disproportionate means for achieving a legitimate goal	<i>Digital Rights Ireland</i>	<i>Digital Rights Ireland</i>	<i>Digital Rights Ireland</i>	<i>Digital Rights Ireland</i>



# Conclusions

- ▶ Both the ECJ and the RCC argued that due to the fact that metadata retention was a significant infringement of the right to privacy , no distinction should be made between it the interception of the content of communications: a warrant specifying particular limits (time, person, area) should be required access to metadata
  - ▶ The RCC and the ECJ show that no distinction between intelligence and law enforcement should be made when accessing metadata: both require a warrant.
- 