

Policing Darkweb marketplaces; covert policing, surveillance and investigatory powers

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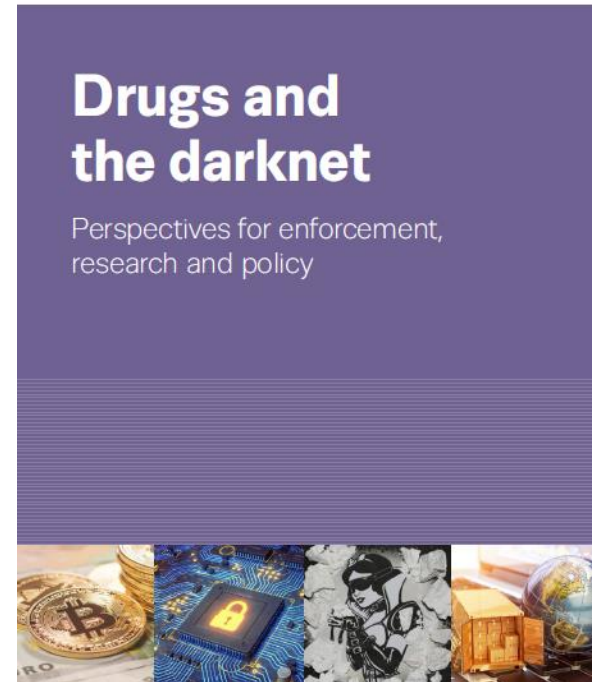
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“Darknet” marketplaces

- The nature of the Darknet (slow and disaggregated but with a major emphasis on privacy and lack of traceability) lends itself to the creation of “marketplaces” for the trade in illicit materials.
- This includes drugs, counterfeit goods, personal information, weapons, other extreme prohibited material etc.



Available at:

<https://www.europol.europa.eu/publications-documents/drugs-and-darknet-perspectives-for-enforcement-research-and-policy>



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Drugs and the Darknet – a growing problem?

“The trade in illicit drugs on darknet markets is a dynamic area subject to rapid change as marketplaces appear and disappear. Overall, the importance of this area seems to be expanding...”

FIGURE 3.1
A range of MDMA quantities offered on **Hansa**

The screenshot shows the Hansa marketplace interface. At the top, there's a navigation bar with 'Home', 'Forums', 'Support', and 'Logout'. Below that, a search bar shows 'Search Results for "MDMA"'. On the left, there are filters for 'Drugs' (265 items), 'Guides & Tutorials' (4 items), and 'Digital Goods' (6 items). A list of vendors is shown, including 'Mdmable', 'xxxMDMA', 'MDMAmpheamineUSA', and 'MDMAZING_USA'. The main search results area displays a list of MDMA products with their prices and quality ratings. The top result is '1G MDMA AAA+ HIGH QUALITY DISCOUNT !!!!' priced at USD 21.22. Other results include '2.5G MDMA AAA+ HIGH QUALITY' (USD 42.45), '5G MDMA AAA+ HIGH QUALITY' (USD 63.67), '10G MDMA AAA+ HIGH QUALITY PROMOTION' (USD 106.12), '25G MDMA AAA+ HIGH QUALITY' (USD 236.78), '50G MDMA AAA+ HIGH QUALITY' (USD 424.50), and '100G MDMA AAA+ HIGH QUALITY' (USD 742.97). A 'Buy Now' button is visible for the top result.

Europol, “Drugs and the darknet”, p.54



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European Monitoring Centre
for Drugs and Drug Addiction



Drugs and the darknet

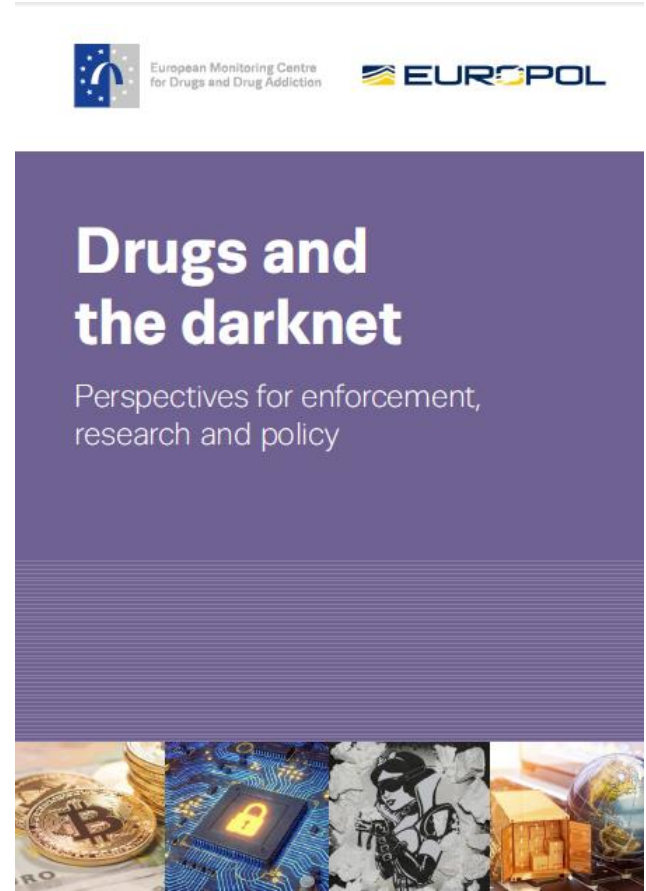
Perspectives for enforcement,
research and policy



Policing Darknet marketplaces

“EU-based suppliers are important players in the darknet ecosystem. In the 2011-2015 period, they accounted for around 46 % of all drug sales in terms of revenue on the darknet markets analysed.” (p.10)

“Established and proven intelligence-led policing approaches, conducted in a technologically coordinated and collaborative manner, are likely to be important components if law enforcement activities are to have a sustained impact.” (p.11)



Darknet marketplaces

Takedown of HANSA and AlphaBay marketplaces following a multi-jurisdiction police operation led by the US FBI & DEA, the Dutch National Police and Europol.

Image:

<https://www.europol.europa.eu/newsroom/news/massive-blow-to-criminal-dark-web-activities-after-globally-coordinated-operation>



The approach to “unlawfully” obtained evidence in England and Wales

- Prima facie admissible
- Subject to exclusion on the grounds of **(un)fairness**
- General discretion to exclude prosecution evidence, s.78 Police and Criminal Evidence Act 1984;
 - In any proceedings the court *may* refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. (emphasis added)

Entrapment

- *R v Sang* [1980] A.C. 402
- A judge in a criminal trial retains a discretion to exclude evidence if its prejudicial effect outweighs its probative value.
 - [Note: this is usually now through the exercise of s.78 PACE 1984]
- Per Lord Diplock [at 433];
 - The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice, it does not give rise to any discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence.

Public Interest Immunity

- Often applies in cases where the prosecution do not want to disclose the source of evidence gathered by covert means.
- *R v H* [2004] UKHL 3 –
 - Requires the court to balance the public interest against the defendant's fair trial (Article 6) rights.
 - Should keep derogation from full disclosure to a minimum
 - Disclosure must be ordered if a fair trial is not possible without disclosure
 - Special counsel may be used



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The concept of “privacy” in England and Wales

- Per Glidewell LJ, *Kaye v Robertson* [1991] F.S.R. 62
“It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy.”
- Per Nolan LJ, *R v Khan (Sultan)* [1997] A.C. 558, 578
“...if evidence obtained by a breach of privacy were inadmissible then privacy too would become a defence to a criminal charge where the substance of the charge consisted of acts done or words spoken in private. Such a proposition does not bear serious examination.”

“Privacy” in England and Wales

- Growing impact of Article 8 ECHR
 - Proportionality / in accordance with the law
 - *S and Marper v the United Kingdom* [2008] ECHR 1581
 - Established the importance of Article 8 ECHR in the Criminal Justice context.
 - Focus on proportionality to avoid “blanket and indiscriminate” regimes.
 - See e.g. *R (on the Application of SD) v The Chief Constable of North Yorkshire and Another* [2017] EWCA Civ 1838
 - Courts in England and Wales now pushing back against “arbitrary” interferences with the Article 8 rights of individuals.

Khan v the United Kingdom (2001) 31 E.H.R.R. 45

- European Court of Human Rights held;
- No breach of Article 6 ECHR
 - The central question is whether the proceedings as a whole were fair... At each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE, and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference.
- There was a breach of Article 8 ECHR
 - Lack of statutory code meant no protection against “arbitrary” interference and a lack of sufficient clarity in the law (so that the breach, whilst proportionate, could not be “in accordance with the law”).

Powers of surveillance, search and seizure in England and Wales

- Police and Criminal Evidence Act (PACE) 1984;
 - Part II grants powers of entry search and seizure
 - Law Commission of England and Wales currently consulting on reform of search warrants.
- Police Act 1997
 - Section 93 - Authorisations to interfere with property etc.
 - Some concern that this power may have been misused.
- Regulation of Investigatory Powers Act (RIPA) 2000
 - Part 2 created the initial statutory framework for Surveillance and Covert Human Intelligence Sources
 - Code of Practice on Covert Surveillance and Property Interference.
- Data Retention and Investigatory Powers Act (DRIPA) 2014
 - Temporary legislation (no longer in force) pending the introduction of the IPA 2016



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Powers of surveillance, search and seizure in England and Wales

- Investigatory Powers Act 2016
 - Received Royal Assent in 2016
 - Subject to review by the UK Government - <https://www.gov.uk/government/consultations/investigatory-powers-act-2016>
 - Criticised as a “snoopers charter” in some sections of the UK media
 - Codes of practice have subsequently been published; <https://www.gov.uk/government/consultations/investigatory-powers-act-2016-codes-of-practice>

Investigatory Powers Act 2016

Part 2 INTERCEPTION OF COMMUNICATIONS

Section 15 – Warrants

- (a) Targeted interception warrants
- (b) Targeted investigation warrants
- (c) Mutual assistance warrants

Part 5 EQUIPMENT INTERFERENCE

Section 99 – Warrants

- (a) Targeted equipment interference warrants
- (b) Targeted examination warrants

Investigatory Powers Act 2016

Section 106 - Power to issue warrants to law enforcement officers [*not yet in force*]

(1) A law enforcement chief... may issue a **targeted equipment interference warrant** if;

(a) the law enforcement chief considers that the warrant is necessary for the purpose of preventing or detecting serious crime,

(b) the law enforcement chief considers that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct,

(c) the law enforcement chief considers that satisfactory arrangements made for the purposes of sections 129 and 130 (safeguards relating to disclosure etc.) are in force in relation to the warrant, and

(d) except where the law enforcement chief considers that there is an urgent need to issue the warrant, the decision to issue the warrant has been approved by a Judicial Commissioner.

Section 107 requires a “British Islands connection”.



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“Targeted Equipment Interference”

101 Subject-matter of warrants

(1) A targeted equipment interference warrant may relate to any one or more of the following matters—

(a) equipment belonging to, used by or in the possession of a particular person or organisation;

(b) equipment belonging to, used by or in the possession of a group of persons who share a common purpose or who carry on, or may carry on, a particular activity;

(c) equipment belonging to, used by or in the possession of more than one person or organisation, where the interference is for the purpose of a single investigation or operation;

(d) equipment in a particular location;

(e) equipment in more than one location, where the interference is for the purpose of a single investigation or operation;

(f) equipment which is being, or may be, used for the purposes of a particular activity or activities of a particular description;

(g) equipment which is being, or may be, used to test, maintain or develop capabilities relating to interference with equipment for the purpose of obtaining communications, equipment data or other information;

(h) equipment which is being, or may be, used for the training of persons who carry out, or are likely to carry out, such interference with equipment.

Tele2 Sverige AB v Post-och telestyrelsen (C203/15)
Secretary of State for the Home Department v Tom Watson
and Others (C698/15)

- Challenge brought to powers under DRIPA (and comparable Swedish provisions) but potentially similarly applicable to certain powers under the IPA 2016.
- CJEU considered the powers of the Secretary of State to issue “retention notices” requiring public telecommunications operators to retain relevant communication data.
- “Retention notices” found to be incompatible with EU regulations (no judicial scrutiny, too unspecific (not restricted to “serious crime”), no strict necessity criterium, data retention risks infringement arts 7,8 and 11 of EU Charter)



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Issues for consideration

The IPA 2016 at least addresses specific conduct already being undertaken

- Are the powers too broadly construed?

Are available challenges / scrutiny sufficient?

- S.78 PACE 1984 – probative value vs prejudicial effect
- Public interest immunity
- Article 6 ECHR - fairness of the process
- Article 8 ECHR – proportionality / in accordance with the law

Importance of other safeguards functioning properly

- Expert evidence / technical expertise?
- Disclosure?