Obstinate Choices

Understanding the Danish Intelligence Scandal

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Denmark is currently going through a full-blown intelligence scandal. It includes charges of illegal activity lodged by the Danish Intelligence Oversight Board (TET) against the Danish foreign intelligence service (FE), as well as a range of criminal cases brought against the former head of FE, a former minister of defence, and a former intelligence officer on charges of leaking classified information. It also includes a parallel scandal involving an alleged former agent, who is trying to get the Danish intelligence services to acknowledge his role in order to vindicate himself (to reduce complexity this element is not covered here). In this post, I argue that these scandals can best be understood through the lens of a series of obstinate choices made by the Danish government and its representatives. Seemingly, because key decision-makers lacked trust and got fed up with leaks, the situation was handled aggressively from the start, as a matter of principle. I explain the complex scandal but focus on specifics only in the case against former minister of defence, Claus Hjort Frederiksen, as his case is the most clear-cut and observable for outsiders.

One or more whistle-blowers

The Danish intelligence scandal exploded into public view when TET issued a press release on 24 August 2020, in which it claimed that FE was operating unlawfully, not being truthful with the Board, and that a risk existed of unauthorised collection against Danish citizens. These claims were made on the basis of information provided by "one or more whistle-blowers". TET sent its analysis to the Minister of Defence on Friday 21 August 2020, and on the following Monday the Ministry announced that the head of FE and two senior employees had been suspended (later, two additional people were sent home). Herein lies the first two offensive choices: When the Minister was provided with TET's analysis and explosive draft press release, she allowed it to go out as is and almost immediately suspended key employees at FE. Former high-level officials have argued that the situation should have been handled quite differently, and the head of TET even gave an interview in which he expressed surprise by how seriously the situation escalated.

The media went to work

The TET press release essentially functioned as a guide for journalistic inquiries, and seemingly in no time, Danish media was able to expose what lay beneath. Incredibly detailed stories laid bare that the criticism revolved around a secret agreement between Denmark and the United States on the tapping of fibreoptic cables running through Denmark. This agreement was described as the 'crown jewels' of Danish intelligence. These stories led to the third and fourth choice that furthered the scandal. Firstly, an unprecedented investigation was initiated within the Danish domestic intelligence service (PET), aimed at identifying the source(s) of these and other leaks. This investigation would lead to an intense surveillance effort against the then suspended head of FE, Lars Findsen, which included tapping his house and extensive use of physical surveillance. This approach was, secondly, only made possible by the decision to view the situation not through the lens of article 152 of the Danish Criminal Code, which is the main criminal rule on disclosures of confidential information, but rather through the lens of article 109, which contains a much more serious rule on disclosures. While the former article is used all the time (including in a case decided in 2020 against the former head of PET) the latter has essentially remained dormant since its introduction in 1866. As

such, it came as a surprise that this article – which carries a maximum sentence of 12 years of imprisonment rather than the normal maximum of six months (or two years in particularly aggravating circumstances) – was used.

Arrests were made

On the morning of 8 December 2021, four people were arrested and charged under article 109, including the suspended head of FE. He was arrested in Copenhagen Airport by members of the Danish Special Intervention Unit and subsequently held in prison for 71 days. The aggressiveness of this approach seems at odds with how these cases would develop:

- Two of the cases were simply dropped. Apparently, there was no basis to maintain them.
- The third case – the one against a former intelligence officer, whose alleged leaks are seemingly unrelated to the cable tapping stories – was dropped down from article 109-charges to article 152-charges.
- The fourth case, against Findsen, was also softened. In the published version of the charges reference is made to both article 109 and 152, thereby opening the door for large parts of the case to be handled under the milder article. Indeed, the case was brought in such a way that the maximum penalty is less than 4 years.

Exoneration, intimidating meetings, and intimate details

While arrests were made, a set of parallel developments were also underway. Firstly, it was reported that the heads of FE and PET had invited several editors of large Danish media institutions to a series of meetings in early December 2021, where they were warned that the passing of confidential information could be a criminal offense. During these meetings the intelligence chiefs even referred specifically to article 109 and its maximum penalty of 12 years of imprisonment, which was subsequently described as intimidating. Secondly, while technically unrelated to the leaks, on 11 December 2021, the Commission, which had been put in place to investigate the claims made by TET, published its findings. Its conclusions were surprising: It found that there was simply no reason to raise criticism. Neither in relation to FE, nor in relation to the persons suspended. Given the confidential nature of the underlying analysis of both TET and this Commission, it is not possible to account for this discrepancy. Soon after, it was also reported that parliamentary party leaders had been briefed in early 2022 on the case against Findsen. In these briefings, the leaders were provided with highly intimate details about Findsen's private life, including sexual preferences. Both the decision to share such details and to warn the media seem highly extraordinary and escalatory.

Frederiksen's case

That brings us to the case against former minister of defence, Claus Hjort Frederiksen. Frederiksen had not been involved in the situation from the start (he was an opposition MP at the time), but when the situation escalated, he felt compelled to comment. As such, Frederiksen made several statements on the situation. On that basis, the Prosecution Service accused Frederiksen of divulging confidential information in violation of article 109. Frederiksen couldn't be formally charged, however, because he was an MP with parliamentary immunity, and in May 2021, it became clear that parliament would not lift his immunity. On 1 November 2022, however, Denmark held parliamentary elections, in which Frederiksen did not run. From that point on he had no immunity, and on 21 February 2023 the Prosecution Service announced that it had formally charged Frederiksen. This chain of events is noteworthy because it illustrates yet another set of offensive choices. First, the choice to initially accuse Frederiksen, knowing that lifting his immunity might be tricky. Second, the choice to charge him after he had left parliament, knowing the backstory. Indeed, in cases such as these, the decision to charge is made by the Minister of Justice, and there was thus amble opportunity to backtrack if that had been preferred.

These choices make it relevant to consider the case against Frederiksen more closely. It is important to note that there is no indication that Frederiksen was

behind any of the original leaks. His case is thus purely about subsequent comments. As mentioned, Frederiksen is charged under article 109, which criminalizes the divulging or disclosing of "any information on secret negotiations, consultations or resolutions of the state in matters affecting the security or rights of the state relative to foreign states or involving substantial economic interests towards other countries". On the face of it, divulging information about the agreement with the Americans would seem to fit. However, there are several legal problems related to the charge, in particular because much of the information provided by Frederiksen was already public knowledge. According to Danish case law, information that is already public knowledge cannot generally be considered confidential.

Confidential public information?

A few years back the former head of PET was charged (and largely acquitted) for having divulged confidential information. In that case, the Court of Appeal of Eastern Denmark stated that: "The duty of confidentiality does not, as a rule, include information that is generally known or that are publicly available, e.g. as a result of media coverage." It went on to say, however, that if the information provided "goes further" than what was already known, such information can be considered confidential. That is the standard that we need to judge the situation against.

The exact charges against Frederiksen are not public, but there are several likely candidates of statements that could be included. One example is a televised interview with TV2 News on 15 December 2021. Here he was asked whether the problem in relation to TET's criticism could be that he and other ministers of defence had simply failed to tell TET about the relevant agreement. Frederiksen answered: "I want to be careful with what I say. I will at least – well, then I will have to risk a prison sentence. I have, in any case, participated in informing them [TET] that this agreement existed." Later, the interviewer refers to a news story where it was revealed that the agreement was concluded in the late 1990's between the prime minister of Denmark and the President of the United States. He then asks Frederiksen if he got that right. The following exchange ensued:

Frederiksen: "Yes, that's how I understood it too."

Interviewer: "This is not something you've been informed about?"

Frederiksen: "Yes, that's how it is."

Interviewer: "You believe, or you know?"

Frederiksen: "I know."

As such, Frederiksen essentially confirmed the existence of the agreement, its origins, and (also in other statements) a range of more general information about the programme. The legal question is thus, if this mere confirmation from someone in his position is a breach of confidentiality, and if he provided additional confidential information. That is likely what the Danish courts will have to consider as they engage with the case. To solve this problem the courts will need to compare Frederiksen's statements to what was publicly available at the time. Of relevance in this regard is, firstly, a story from 2014 in which a Danish newspaper, using documents from the Snowden-leaks, revealed that a Danish-US partnership on the tapping of fibreoptic cables existed. The newspaper wrote that FE "is apparently participating in a hitherto secret collaboration with the [NSA] about the tapping of fibre cables that transport internet and telecommunications traffic through Denmark." Secondly, the many media revelations since TET's 2020-press release, beginning with *Weekendavisen* on 3 September 2020, revealed a range of details about the agreement – although on the basis of unnamed sources. Given this lack of clarity on the actual crime committed by Frederiksen, the decision to charge him – especially the second time – seems a highly principled rather than practical choice.

A scandal that got out of hand

How did Denmark end up in a place where the 'crown jewels' of Danish intelligence were revealed, and trial after trial is leading to new revelations? Seemingly, the government has consistently been keen on acting quickly and decisively, and with an emphasis on clamping down on leaks, rather than trying a softer hand in order to keep a lid on the story. Key decision-makers have been highly obstinate in their approach to

the scandal, employing a risky, offensive strategy that, in my view, has backfired to a degree that should lead to serious reflection.

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