Symposium on IFFs: Piercing the Veil of Secrecy in Illicit Financial Flows

By:

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Introduction

In the last decade, there have been seven major leaks of financial documents in tax havens which have exposed the international web of financial flows, mechanisms to facilitate these flows and the major role players in these activities. In each leak, questions often arise on how both legal loopholes and illicit means are used to facilitate the outflow of funds from low- and middle-income countries to tax havens by corporations, wealthy individuals, and politically exposed persons (PEPs). These leaks are often the result of whistleblower-led investigations and the release of these financial documents has become a primary resource in understanding how financial corruption works globally. The effects of these leaks have seen heads of government sacked or resigned in some cases while little to no action takes place in other countries. However, what is undeniable is the role of whistleblowers is

increasingly becoming central to curbing illicit financial flows (IFFs) especially as the global digital economy and stronger privacy-enhancing technologies make the detection of IFFs harder. Within Africa, very few countries have comprehensive national laws for whistleblowers despite the majority ratifying international agreements for the protection of whistleblowers. Using Nigeria, Kenya, and South Africa as case studies, this note reviews the regulatory landscape in the countries and the extent to which current laws and practices aid or hinder whistleblowing on IFFs.

Cryptocurrencies and privacy as a tool for IFFs

Cryptocurrencies, a pseudonymous digital asset which allows people to send and receive funds without their identity being revealed are fast becoming a dominant method to engage in illicit financial activities. The largely uncoordinated regulation of cryptocurrencies has also enabled the rise of cryptocurrency as an alternative to traditional monetary instruments to facilitate IFFs. The blockchain technology behind cryptocurrency which makes it harder for outsiders to track transactions has also enabled its use as an effective mechanism for IFFs.

Privacy has always been the cloak under which IFFs thrive and in the past 50 years, Africa has reportedly lost approximately $1 trillion in IFFs, an amount equal to all the development aid received by African countries during the same period. The implications for African economies cannot be quantified as the stark inequality in Africa continues to widen. Several studies have shown that resource revenues are at particularly high risk and susceptible to externalization through illicit channels.

There have been several attempts in the past to tackle the surge of IFFs at both national and multilateral levels. While some of the solutions proposed in the past are yet to be implemented, the privacy-enhancing technology that blockchain provides for cryptocurrencies has rendered the task of curbing IFFs more difficult. Nevertheless, as the various financial leaks in the past have demonstrated, whistleblowers can play a critical role in exposing IFFs, and serve as an effective mechanism employed to assist regulators in tracking and curbing such flows. However, whistleblowing can only play a pivotal role in tracking IFFs if there are appropriate protections in place for whistleblowers

which are currently lacking in most African countries.

Whistleblower protections in Africa

Whistleblowing has been an under-appreciated mechanism for tackling corruption broadly and IFFs specifically in Africa. Olesen defined the term whistleblowing as, “the insider or external disclosure of what is perceived to be evidence of illegal conduct or other serious risks; out of or in relation to an organization’s activities including the work-related activities of its staff.” As a result, different national jurisdictions, international and regional bodies recognise different values and objectives of whistleblowing. Internationally, the collapse of the global market on the back of dishonest trading and the effect of various leaks from tax havens have given new impetus for whistleblowing. However, in countries such as South Africa and Kenya where some whistleblower protections are in place, whistleblowing is on the decline, and this is attributable to the lack of adequate protections which have resulted in the loss of lives of whistleblowers in some cases.

Since IFFs are inherently cloaked by secrecy, uncovering these acts requires disclosures to be made by people with inside knowledge of the activities. This is particularly important when IFFs occur using cryptocurrencies where external tracking of financial flows is a lot harder. Such disclosures need to be incentivized or adequate protections offered to whistleblowers. Across Africa, only seven countries have whistleblower protection laws. Combating IFF is central to the African Union’s (AU) objective of promoting intra-African trade and investment through the African Continental Free Trade Agreement, yet a regional approach to whistleblower protections is currently not on the table as an important path for curbing IFFs. A review of three country approaches to whistleblower protections in Africa shows the need for continental leadership in defining a minimum benchmark for whistleblower protections in African states.

Nigeria

In Nigeria, a whistleblowing policy is in place and has a unique feature of incentivizing whistleblowing by providing that whistleblowers can earn between 2.5 - 5 percent of any recovered funds that were due to a whistleblower’s information disclosure. Since the introduction of the policy, there have been Akinkugbe’s point is an important one given the fact that while whistleblower

protections may exist in law, without a robust social architecture to address prevailing norms that stigmatize whistleblowers and, in fact, create unsafe environments for them, legal protections will do little to encourage the disclosure of information to tackle IFFs.successful financial asset recoveries and prosecutions. Despite the modest success of this policy and whistleblowing program in Nigeria, Akinkugbe has argued for the adoption of a comprehensive law on whistleblowing including the development of solutions that "address the complex background of informal social networks of corruption, power dynamics, and social norms that are peculiar to the Nigerian economic and political context." Akinkugbe's point is an important one given the fact that while whistleblower protections may exist in law, without a robust social architecture to address prevailing norms that stigmatize whistleblowers and in fact create unsafe environments for them, legal protections will do little to encourage the disclosure of information to tackle IFFs.

Kenya

A study by Transparency International established that Kenya has no overarching legislation on whistleblowing protection. Legal protections to safeguard persons who disclose information on corruption are spread across the various global, regional and domestic legal frameworks which the country has ratified. The Kenyan Constitution guarantees the protection of witnesses or vulnerable persons including safeguarding their freedom, rights and security from any physical or psychological harm. However, since the introduction of a draft whistleblower protection bill in Kenya in 2013, successive governments have failed to adopt the law. Nevertheless, the Anti-Corruption and Economic Crimes Act lays the foundation for the investigation and punishment of corruption and economic crimes, and section 65 of the same law guarantees protections for informers. The Bribery Act also provides limited protection for whistleblowers from harassment and intimidation. As argued by Transparency International, "the absence of a comprehensive whistleblower protection law not only discourages potential whistleblowers from coming forward but also perpetuates a culture of silence and impunity."

South Africa

The Protected Disclosures Act (the PDA) was adopted in 2000 to protect whistleblowers in the employment context in South Africa. The PDA sets out procedures for workers, in both the public and private sectors, to disclose illegal conduct by their employers and colleagues without fear of victimization. The PDA also contains a balancing exercise which involves the rights of the whistleblower to fair labor practices and to be immune against civil and criminal liability flowing from a disclosure of information which shows or tends to show that a criminal offence has been committed on the one hand and the right to privacy of an institution on the other hand as well as protection against false disclosures.

The PDA is quite progressive in this sense as it recognizes a range of institutions that employees can make disclosures to. The courts have interpreted the protection the PDA offers to extend to disclosures made to the media which would cover similar global leaks from tax havens to journalists as we have frequently seen over the years.

In addition, South Africa's Companies Act makes it compulsory for companies to have whistleblowing mechanisms for their employees. The Companies Act provides that a person including a wide range of actors such as a shareholder and director can make a disclosure in good faith and with reasonable belief to a category of bodies on various wrongdoings and such person will be immune from civil, criminal and administrative liability and will also be entitled to damages suffered. The Companies Act is significantly wider in scope than the PDA given it allows persons other than employees to make disclosures and subsequently to be subject to protection. It also permits a whistleblower to claim damages from any individual aside from the employer who causes a detriment to the whistleblower because of the disclosure. The Companies Act also allows for disclosures by juristic persons. This is wider than the scope of the PDA and more significantly, in the case of the Companies Act, creates an avenue to deal with confidentiality concerns that whistleblowers may have regarding their identity.

A continental push for whistleblower protections

Article 5 of the AU Convention on Preventing and Combating Corruption requires states to adopt whistleblower protection laws and despite the

ratification of the Convention by most states, this has yielded very little result in several African states.

There have been African regional initiatives in the past including the adoption of model laws as an advocacy tool to encourage AU members to adopt national laws that fulfil the objectives of the AU. These model laws also serve as a benchmark and resource for the adoption of uniform laws across the AU. A successful example of this is the adoption of the Model Law on Access to Information in 2013 by the African Commission on Human People's Rights (ACHPR). When the Model Law was formally adopted, four African states passed their access to information laws within the same year and ten countries passed an access to information law within five years of the Model Law being adopted. The adoption of the Model Law served as an advocacy resource for the ACHPR Special Rapporteur on Access to Information, which helped fast-track the passage of access to information laws in some countries. This kind of approach can be replicated in a push for the adoption of overarching whistleblower protection laws across African states with a legal design that is specifically geared towards using these laws as a mechanism for tackling IFFs in Africa.

Conclusion

Tackling IFFs from Africa requires a multi-pronged approach. The 2015 AU High-Level Panel on IFFs from Africa recommended the adoption of beneficial ownership transparency laws. Yet, despite the UK adopting such a transparency law in 2022, it was reported by Transparency International that more than 52, 000 properties are still owned anonymously in the UK, a leading destination for IFFs from other countries. This is an example of the limits of focusing on one regulatory approach and the need for several legal and policy designs including robust implementation mechanisms to curb IFFs effectively. The help of key IFF role players is needed in dismantling the structure of IFFs through information disclosure to aid the work of regulators.

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