

The false securities reports of Mr. Ghosn (Nissan)

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Mr. Ghosn should be found not guilty.

Prosecutors have partially indicted the now-former chairman of Nissan on charges of violating the Japan Financial Instruments and Exchange Act¹ by failing to disclose approx. nine billion yen(approx.US\$80million) of compensation in Nissan's annual securities reports, payable to Mr. Ghosn after the termination of representative director and chairman by the board of Nissan.

Nissan's board of directors was delegated the power including such additional remuneration amount by Nissan's shareholders meeting. . Directors' remuneration must be approved by resolution of the shareholders at a company shareholders meeting, under the Japan Companies Act.²

According to Nissan's securities reports, ³Nissan's shareholders passed a resolution on June 25, 2008, that: "*all directors' monetary remunerations will total a maximum of JPY 2,990,000,000 per year*", and Nissan was thereby able to decide the total remuneration for its directors every year following this resolution, within a range that would not exceed this maximum. According to the Japanese media reports, Mr.Ghosn's remuneration totaled JPY 7,891,000,000 between March 2011 and March 2018, an average of slightly less than one billion yen per year. According to a ruling of the Supreme Court of Japan,⁴ a board of directors may decide each director's remuneration separately under such a resolution. Nissan's board of directors delegated further the authority to decide the remuneration of Nissan's directors to chairman of the board, Mr. Ghosn. The Disclosure rule of directors under which an individual director's compensation is hundred million yen or more became applicable on or after

¹ Law No.25 of April 13,1948, as amended.

² Article 361, para 1.

³ Page 43/122.

⁴ Supreme Court Judgement of March 26, Showa 60th year(1985) Hanrei Jihou No.1159 page 150 .

the fiscal year 2009.⁵

Each year while he was chairman (on and after 2009), Mr. Ghosn decided to defer more than half of his remuneration until after his retirement from that position, and that plan was expressed in the creation of two documents. The first document was his remuneration agreement with Nissan. This agreement said that one billion yen would be paid to Mr. Ghosn as remuneration, and another one billion yen would be paid to Mr. Ghosn after his resignation as chairman of Nissan. These agreements, repeated over nine years, bear the signatures of Mr. Ghosn and the then-current senior official in the secretary's office of Nissan. The second document described the nature of Nissan's payment to Mr. Ghosn after his resignation, as payable for either consultation or non-competition fees. This document bears the signature of Mr. Ghosn, the signature of Mr. Kelly (now a former representative director of Nissan), and the signature of Mr. Saikawa (the current representative director of Nissan).

The nature of Mr. Ghosn's alleged crime, in short, is the concealment of this nine billion yen in future costs from Nissan's shareholders. However, this nine billion yen was not truly future costs, as it does not appear to have been a binding debt on Nissan. It was rather only a reflection of Mr. Ghosn's wishes. The purpose of securities reports is to inform investors of the accurate financial status of a company. Writing this future payment desire into its securities reports even though this future payment was not a firm and fixed debt could have confused Nissan's investors as to the certainty of that payment and the financial status of the company.

There is no doubt that Mr. Ghosn wanted to receive this future payment. As mentioned, he stated in internal documents that there was approximately one billion yen which would not be paid to him every year because it would be paid after his resignation, and he did have sole authority to decide each year as chairman each director's remuneration. However, for this amount to be future costs, Nissan had to bear a legal obligation to make this future payment as a firm and fixed debt.

⁵ Cabinet Order concerning Disclosure of Company Contents of January 30, Showa 48th year (1973) Finance Ministerial Order No.5 as amended, Art15 form III. 6(1) Circumstances of Corporate Governance (37), Form II, Attention (56) Corporate Governance Circumstances-(d)

According to the prosecutors' allegations, it was a firm and fixed debt, and Mr. Ghosn could receive the nine billion yen whenever he wanted. It is my view that preparing the two internal documents indicating Mr. Ghosn's desire is itself powerful evidence of the opposite. Mr. Ghosn was chairman at the time of preparing the two documents and, therefore, agreements between Mr. Ghosn and Nissan would have involved an obvious conflict of interest. Such agreements involving conflicts of interest, if intended to be binding, are invalid unless approved by the board of directors. In the absence of such board approval, such documents are just memoranda. Further, it is difficult to interpret by the internal documents that Mr. Ghosn made the organizational decision as chairman for Nissan to allocate each one billion yen to himself in light of the fact that the Profit and Loss Statements as well as the Balance Sheets of Nissan have never included such additional remuneration as compensation to him or expenditure otherwise for the company.

In my opinion, Mr. Ghosn doesn't have any legal right to receive the nine billion yen from Nissan. Even if Mr. Ghosn has expressed his desire to receive that amount in a particular manner, Mr. Ghosn himself, his successor, or the board of directors could at any time decide that Nissan will, or will not, pay all or part of the nine billion yen. There would be no legal liability for Nissan if no payment were made.

In this situation, relying only on Mr. Ghosn's desire and his authority to decide each director's remuneration, it is impossible to regard this nine billion yen as a firm and binding debt. Disclosure of such desired future payments not being explicitly defined in the requirements for Nissan's securities reports, we must strictly interpret the facts under the principle of *nulla poena sine lege*. One cannot be punished for something that is not prohibited.

All the above facts are taken from newspaper media reports.