

The Business Judgment Rule Limiting State-Owned Enterprise Directors' Liability After the SOE Law Amendment

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Abstract

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This study examines the function of the Business Judgment Rule (BJR) as a boundary of legal liability for the management organs of State-Owned Enterprises (SOEs) in Indonesia following the recent amendments to the State-Owned Enterprises Law. Using a normative juridical research method with statutory and conceptual approaches, this research analyzes the normative foundation of BJR within Indonesian corporate law, the implications of regulatory changes on the responsibilities of directors, commissioners, and supervisory boards, and the extent to which BJR can serve as a shield against civil and criminal liability. The findings show that BJR, grounded in fiduciary duties under the Limited Liability Company Law, provides legal protection for business decisions made in good faith, without conflicts of interest, based on adequate information, and within the scope of authority. However, the removal of the provision excluding SOE organs from the category of state officials has widened potential liability and necessitated greater professional accountability. The study further reveals differences in the application of BJR between Persero-type SOEs, which are fully governed by private corporate law, and Perum-type SOEs, which remain tied to public administrative principles, creating risks of disharmony with anti-corruption and state finance laws. The research concludes that the ideal model for implementing BJR in SOEs requires standardized risk assessment procedures, strengthened oversight documentation, and harmonization of the SOE Law, Company Law, Anti-Corruption Law, and State Finance Law to ensure a balance between managerial protection and state accountability in managing public assets.

1. Introduction

The amendments to the legal framework governing State-Owned Enterprises (BUMN) under Law No. 1 of 2025 and Law No. 16 of 2025 have generated new dynamics in understanding the scope and form of legal liability of BUMN management organs, particularly the Board of Directors, Board of Commissioners, and Supervisory Board. These amendments have direct implications for the manner in which business decisions of BUMN are evaluated, especially when such decisions result in financial losses for the enterprise or the state. Within this evolving landscape, the Business Judgment Rule (BJR) once again emerges as a pivotal concept for determining whether managerial decisions constitute reasonable business risks or actions that are legally attributable.¹

Conceptually, BUMN are entities that conduct business activities using state capital, as affirmed by the State Finance Law, which recognizes that state assets separated into state-owned companies remain part of state finances. This construction implies that losses incurred

¹ Hamidin et al., "Analisis Penerapan Prinsip Business Judgement Rule Terkait Dengan Pertanggung Jawaban Pidana Pada Direksi Badan Usaha Milik Negara (BUMN)," *YUSTISI* 11, no. 2 (2024): 343-57, <https://doi.org/10.32832/yustisi.v11i2.16690>.

by BUMN are often presumed to be identical to losses to the state. Consequently, BUMN management faces a distinct position compared with management in private corporations, as every business decision involving risk may potentially be drawn into the realm of criminal liability, particularly corruption offences.

This issue has become increasingly prominent following the deletion of Article 9G of the BUMN Law, previously stipulating that BUMN directors, commissioners, and supervisors are not public officials through the Fourth Amendment to the BUMN Law in 2025. Its removal eliminates a conceptual boundary that formerly separated the private liability of corporate organs from public-law accountability, thereby reopening the possibility of applying public law, including the Anti-Corruption Law, to business decision-making within BUMN. As a result, uncertainty arises regarding the standard for determining whether an act constitutes a legitimate business policy or an abuse of authority.

In this context, the Business Judgment Rule assumes strategic relevance. BJR is a principle of corporate law that affords protection to directors and commissioners for business decisions made in good faith, free from conflicts of interest, based on adequate information, and within the scope of their authority.² Historically, the doctrine aims to prevent excessive interference in managerial decisions that are purely commercial in nature. However, applying BJR to BUMN is considerably more complex than in private corporations, given the hybrid legal structure of BUMN at the intersection of corporate and public law.

The amendments to the BUMN Law also have implications for how BJR is applied. In BUMN Persero, which is fully subject to the Limited Liability Companies Law, BJR should operate comprehensively as a protective mechanism for management in business decision-making. Conversely, in BUMN Perum, which falls under the administrative-law regime, the scope of BJR tends to be more restricted and must align with principles of public service accountability. Disharmonies among the BUMN Law, the Companies Law, the Anti-Corruption Law, and the State Finance Law create interpretive gaps that potentially lead to legal uncertainty.

These complexities are observable in several cases, including the prosecution of Karen Agustian, former President Director of PT Pertamina, whose investment decision was deemed to have caused state financial loss and ultimately resulted in criminal liability. This case illustrates the thin line between legitimate business risks and alleged abuse of authority, as well as the extent to which the absence of clear BJR standards may lead to the criminalization of business decisions that fall within managerial discretion.³ This situation underscores the need to clarify the position of the Business Judgment Rule as a legal instrument for determining the limits of liability for BUMN directors, commissioners, and supervisory boards. While accountability for the management of state assets remains essential, the state must simultaneously ensure that BUMN executives retain sufficient space to make professional business decisions without fear of criminalization. Accordingly, examining the

² Anisa Deny Setiawati and Mokhammad Gisa Vitrana, "Doktrin Business Judgment Rule dalam UU BUMN: Batas Tanggung Jawab Direksi dalam Tindak Pidana Korupsi," *JURNAL RECHTENS* 14, no. 1 (2025): 155-70, <https://doi.org/10.56013/rechtens.v14i1.4256>.

³ Bunga Dita Rahma Cesaria, "Memahami Fiduciary Duty Direksi Berdasarkan Hukum Indonesia: Studi Perbandingan dengan Hukum Inggris," *Begawan Abioso* 16, no. 1 (2025): 11-22, <https://doi.org/10.37893/abioso.v16i1.1167>.

application of BJR following the amendments to the BUMN Law is crucial to ensuring a balance between legal protection for business decision-makers and oversight mechanisms to prevent abuses of authority.

Although previous studies have examined aspects of BUMN management liability, several gaps remain unaddressed. For example:

1. Monica Elizabeth Dina's (2025) research on the application of the Business Judgment Rule in BUMN discusses BJR but does not address the 2025 amendments to the BUMN Law or their impact on the status of BUMN organs.⁴
2. Hamidin et al. (2024), in "Analysis of the Application of the Business Judgment Rule in Relation to Criminal Liability of BUMN Directors," focus primarily on corruption offences but do not distinguish between the application of BJR in BUMN Persero and BUMN Perum.⁵
3. Dewi Kartikasari (2016), in "The Dilemma of Applying the Business Judgment Rule in BUMN Commercial Transactions," examines the criminalization of business decisions but does not relate BJR to the disharmony among the Companies Law, the BUMN Law, and the Anti-Corruption Law.⁶

Based on these studies, three key research gaps become apparent: (1) the absence of a focused analysis on the application of the Business Judgment Rule following the 2025 amendments to the BUMN Law; (2) the lack of differentiation between the application of BJR in BUMN Persero and BUMN Perum; and (3) the absence of a comprehensive study mapping the linkages between BJR, the concept of state financial loss, and the potential criminalization of business decisions within a unified normative analysis.

Thus, this research, titled "The Business Judgment Rule as a Limitation on the Liability of State-Owned Enterprise Management Organs Following the Amendment of the BUMN Law," seeks to fill those gaps. It aims to provide a juridical explanation of how BJR should operate as a standard for evaluating decisions of the Board of Directors, Board of Commissioners, and Supervisory Board of BUMN under the new legal regime, and how the principle may function both as a mechanism for legal protection and as a tool to uphold accountability in the management of state assets.

2. Methods

This study employs a normative legal research method, which focuses on examining legal norms contained in legislation and scholarly doctrine. Two approaches are utilized: the statutory approach, which analyzes normative provisions, and the conceptual approach, which explores relevant principles and theories. The legal materials consist of primary legal materials in the form of legislation and secondary legal materials including books, scholarly

⁴ Monica Elizabeth Dina, "Penerapan Prinsip Business Judgement Rule Pada Badan Usaha Milik Negara," *Lex Prospicit* 3, no. 1 (n.d.): 1 February 2025, <http://dx.doi.org/10.1966/1.p.v3i1.7210>.

⁵ Hamidin et al., "Analisis Penerapan Prinsip Business Judgement Rule Terkait Dengan Pertanggung Jawaban Pidana Pada Direksi Badan Usaha Milik Negara (BUMN)."

⁶ Prasetio Prasetio, "Dilema Penerapan Business Judgement Rule dalam Transaksi Komersial BUMN," *Jurnal Magister Ilmu Hukum* 1, no. 2 (2021): 26, <https://doi.org/10.36722/jmih.v1i2.734>.

journals, and other supporting literature. The analysis is prescriptive in nature and is conducted using deductive reasoning.⁷

3. Results and Discussion

3.1. Regulation of the Business Judgment Rule Following the Amendments to the BUMN Law

The Business Judgment Rule (BJR) is a juridical doctrine rooted in the common law tradition and has long functioned as a mechanism to limit judicial intervention in managerial decision-making. In essence, the BJR provides a “safe harbour” for members of the Board of Directors (and in practice also commissioners who participate in managerial decisions), ensuring that business decisions made in good faith, free from conflicts of interest, and based on adequate information cannot easily be invalidated or used as grounds for legal liability merely because such decisions ultimately result in losses. This doctrine affirms the presumption that corporate managers are better positioned to assess risks and make business judgments than courts conducting an *ex post* review.⁸

The BJR receives normative affirmation through the provisions of the Limited Liability Companies Law (UU PT). Although the term “Business Judgment Rule” is not explicitly used in the statute, the substance of its protections is embodied in Article 97(5) of the Companies Law, which essentially stipulates that directors cannot be held liable for losses suffered by the company if they can prove certain criteria (including: the decision was not made due to fault or negligence; the directors acted in good faith and with due care; they did not have a conflict of interest; and they took preventive measures to avoid or mitigate losses).⁹ Accordingly, Article 97(5) serves as the normative foundation of the BJR within Indonesian corporate law.

The primary function of the BJR within the corporate legal system is twofold. First, the BJR protects managerial discretion in making business decisions that inherently involve reasonable commercial risks from retrospective litigation. This protection is essential to prevent the “criminalization of business decisions” or excessive litigation against directors who merely undertake rational but risky commercial actions. Second, the BJR also operates as a governance instrument: protection is granted only when management can demonstrate that the decision-making process adhered to professional standards, such as proper documentation, due diligence, expert consultation, and, where necessary, approval from the General Meeting of Shareholders (GMS).¹⁰ Thus, the BJR is not an absolute licence; it is conditional, enforcing accountability through evidentiary requirements.

The interrelationship between the BJR and fiduciary duties – namely the duty of care and the duty of loyalty, is organic and fundamental. The BJR inherently presumes that corporate managers have fulfilled their fiduciary duties, which include acting in the best interests of the corporation (duty of loyalty) and exercising appropriate prudence, diligence,

⁷ Peter Marzuki, *Penelitian Hukum: Edisi Revisi*, 13: Revisi (Kencana Prenada Media Group, 2017).

⁸ Cesaria, “Memahami Fiduciary Duty Direksi Berdasarkan Hukum Indonesia.”

⁹ V. Andri Hananto, “Doktrin Business Judgment Rules Sebagai Paradigma Pengawasan Pengelolaan Badan Usaha Milik Negara,” *Jurnal Surya Kencana Satu : Dinamika Masalah Hukum dan Keadilan* 13, no. 1 (2022): 13–32, <https://doi.org/10.32493/jdmhkdmmhk.v13i1.20213>.

¹⁰ Asri Ardison, “Doktrin Piercing The Corporate Veil Dalam Pertanggung Jawaban Direksi Perseroan Terbatas,” *Jurnal Ilmiah Hukum Dirgantara* 8, no. 1 (2017).

and informed judgment (duty of care).¹¹ When good faith, the absence of conflicts of interest, and reasonable inquiry can be proven, the manager is entitled to BJR protection; conversely, violations of fiduciary duties constitute legitimate grounds to deny that protection. In other words, the BJR operates as a shield derived from the fulfilment of fiduciary obligations – when those obligations are not met, the shield collapses. Corporate law scholars emphasize that the distinction between a “bad business decision” (a poor but properly made decision) and “legal negligence” (fault giving rise to liability) ultimately hinges on evidence of compliance with fiduciary duties.

Indonesian judicial practice and literature highlight two key concerns. First, the application of the BJR in Indonesian courts still faces evidentiary challenges: there is no standardized benchmark for determining what constitutes “good faith,” “adequate information,” or “due care,” leaving such assessments largely to judicial discretion and case-specific contexts. Second, debates arise when the BJR intersects with public interest considerations, particularly in enterprises funded by state assets (BUMN), because the application of BJR protections must be balanced against principles of public accountability and safeguards against potential state financial losses. Consequently, several reconstructive studies emphasize the need for clear evidentiary parameters and governance guidelines (e.g., documentation of high-risk decisions, mechanisms for GMS approval, the role of independent commissioners) so that the BJR can operate effectively without obscuring legal responsibility.

Amendments to the BUMN Law introduce significant consequences for the construction of liability for the Board of Directors, Board of Commissioners, and Supervisory Board. The reformulation of norms, both in relation to authority structures and governance principles – directly influences the extent to which the BJR may operate as a boundary of legal liability for BUMN management organs.

a. Changes in the Authority Structure of Directors, Commissioners, and Supervisory Boards

One of the defining features of the amended BUMN Law is the reorganization of corporate organ authority to align with modern corporate governance principles. The Board of Directors is reaffirmed as the executive organ holding full authority over BUMN management, consistent with the doctrine of “full authority and responsibility” recognized under the Companies Law. At the same time, the amendments strengthen the supervisory functions of the Board of Commissioners and the Supervisory Board through enhanced performance evaluation, risk-control mechanisms, and approval of major corporate actions.

This new configuration shifts inter-organ relations from an administrative model to a corporatist model. As a result, decisions of the Board of Directors must be understood within the framework of discretionary power rather than mere administrative implementation. This is precisely where the BJR becomes relevant: directors cannot be held legally liable for business decisions made in good faith, based on rational considerations and adequate information. Conversely, the Board of Commissioners and Supervisory Board may not unilaterally

¹¹ Cesaria, “Memahami Fiduciary Duty Direksi Berdasarkan Hukum Indonesia.”

overturn or reassess business decisions of the directors as long as they remain within the scope of lawful authority.

b. The Principles of Professionalism and Accountability

The amended BUMN Law reinforces professionalism as the foundational principle for the operation of corporate organs. This principle requires each organ to perform its functions based on competence, integrity, and reasonable skill and care. Normatively, this closely corresponds to fiduciary duties under corporate law, the duty of care and the duty of loyalty. These duties are not merely ethical expectations but also legal parameters for determining whether the BJR may be invoked.¹²

Regarding accountability, the amended BUMN Law places corporate managers within a legal regime that must consider the interests of the state as shareholder or capital owner. This increases the sensitivity of liability assessments, especially concerning potential state losses as regulated in the State Finance Law and the Anti-Corruption Law. Accordingly, the BJR functions as a balancing mechanism, ensuring that managers retain sufficient discretion to undertake business risks without fear of unjustified criminalization.¹³ Professionalism and accountability thus become both behavioral standards and prerequisites for the application of the BJR. Where a decision fails to meet reasonable professional standards or involves conflicts of interest, it falls outside the scope of BJR protection.

c. Differences in the Application of the BJR in BUMN Persero and BUMN Perum

BUMN Persero is subject to the Companies Law insofar as its provisions do not conflict with the BUMN Law. This results in a relatively well-established application of the BJR in BUMN Persero, as liability standards refer directly to Article 97(5) and Article 108 of the Companies Law – provisions that articulate the core elements of the BJR:¹⁴

1. good faith;
2. reasonable care (duty of care);
3. actions taken in the interests of the company;
4. absence of conflicts of interest (duty of loyalty).

Accordingly, business decisions by the directors of a Persero fall within a legally protected sphere of discretion insofar as these criteria are satisfied. The BJR in this context serves as an immunity doctrine against civil, criminal, and administrative claims arising from rational, adequately informed business decisions. Harmonization issues in Persero are relatively limited, as its profit-oriented corporate structure aligns with the core logic of the BJR, which is designed to protect risk-bearing business judgments. In contrast, BUMN Perum is not structured as a limited liability company but as a state enterprise wholly owned by the

¹² Cesaria, "Memahami Fiduciary Duty Direksi Berdasarkan Hukum Indonesia."

¹³ Danu Ade Setiawan, "Tata Kelola BUMN Paska Pemberlakuan UU No. 1 Tahun 2025: Sebuah Tinjauan Kritis Berdasarkan Teori Kepastian Hukum," *AL WASATH Jurnal Ilmu Hukum* 6, no. 2 (2025): 123–36, <https://doi.org/10.47776/alwasath.v6i2/1794>.

¹⁴ Gusti Muhammad Farhan et al., "Analisis Yuridis Aspek Itikad Tidak Baik Dalam Penerapan Prinsip Business Judgement Rule Yang Dilakukan Oleh Direksi Perusahaan Dalam Perspektif Kepastian Hukum," *Jurnal Hukum Jurisdictie* 7, no. 1 (2025): 23–44, <https://doi.org/10.34005/jhj.v6i2.158>.

state and whose capital is not divided into shares.¹⁵ Its primary function is to deliver public benefits through the provision of public goods and services (public service obligations). Thus, Perum is subject to:

- a. the BUMN Law,
- b. administrative law,
- c. public service principles, and
- d. administrative state-finance accountability mechanisms.

This structure imposes limitations on the application of the BJR in Perum because:

1. Decisions are not always based on commercial logic but on public-interest considerations that may require actions that are economically inefficient yet legally rational.
2. Liability is closely linked to state-finance rules, increasing the risk that losses may be classified as state financial losses.
3. Not all elements of the BJR can be applied fully – particularly the element of “acting in the interests of the corporation,” because Perum prioritizes public interest rather than corporate interest.

Thus, the BJR in Perum is applicable only to the extent that decisions constitute legitimate administrative discretion that is rational and consistent with public service mandates. The protection available under the BJR is therefore narrower than that available to Persero management.

The amended BUMN Law aims to recalibrate BUMN governance to align with principles of good corporate governance. However, differences in the legal character of Persero and Perum generate potential disharmonies in applying the BJR. This can be observed across three dimensions:

a. Legal Purpose Disharmony

The Companies Law grounds the BJR in a profit-oriented logic, whereas the BUMN Law mandates Perum to pursue public-interest objectives. This divergence creates normative tension when decisions that are rational from a public-interest perspective are not commercially rational. Consequently, the BJR cannot be uniformly applied across all BUMN.

b. Accountability Regime Disharmony

Persero is subject to private-corporate liability rules, whereas Perum is governed by administrative law and state-finance accountability. This creates a heightened risk of criminalization for Perum management when administrative or business decisions are deemed to cause state losses, even if the decisions followed reasonable procedures. The gap indicates that harmonization between BJR and the Anti-Corruption Law remains inadequate.

c. Governance Principle Disharmony

Following the amendments, state intervention in BUMN decision-making has increased through mechanisms for determining strategic policies. While this enhances accountability, it also obscures the delineation of liability for directors when strategic decisions are effectively

¹⁵ Farhan et al., “Analisis Yuridis Aspek Itikad Tidak Baik Dalam Penerapan Prinsip Business Judgement Rule Yang Dilakukan Oleh Direksi Perusahaan Dalam Perspektif Kepastian Hukum.”

mandated by the state. The BJR becomes difficult to apply when decisions stem from state instruction rather than independent managerial judgment.

3.2. The Business Judgment Rule as a Limitation on the Liability of the Board of Directors, Board of Commissioners, and Supervisory Board of State-Owned Enterprises

The application of the Business Judgment Rule (BJR) as a limitation on the liability of State-Owned Enterprise (SOE) management requires the use of clear evaluative criteria. These parameters are principally adopted from the doctrine of corporate fiduciary duties as developed in corporate law and common-law jurisprudence and subsequently integrated with national provisions, particularly Articles 97 and 108 of the Limited Liability Companies Law (UU PT). Within the SOE context, these parameters serve to determine whether a decision made by the Board of Directors, Board of Commissioners, or Supervisory Board qualifies as a legitimate and protected business decision, or whether it constitutes conduct triggering legal liability.¹⁶

Good faith constitutes a fundamental element governing the applicability of the BJR. In corporate doctrine, good faith is understood as an honest, loyal, and sincere attitude in performing managerial duties for the benefit of the company. Article 97(2) of the Companies Law mandates that the Board of Directors must manage the company in good faith and with full responsibility. For SOEs, particularly SOE Persero, this parameter is used to assess the subjective motives of management in undertaking corporate actions. Decisions motivated by good faith are protected even if they do not yield economic benefit. Conversely, indications of abuse of authority, manipulation, or objectives inconsistent with the interests of the SOE defeat the applicability of BJR protection. In SOE Perum, the assessment of good faith also considers public-service objectives.¹⁷ Decisions that appear “financially detrimental” may still fall within the scope of good faith if taken to fulfil public-service obligations mandated by law.

The second parameter concerns the absence of conflict of interest between the personal interests of management and the interests of the SOE. Article 99 of the Companies Law expressly prohibits directors or commissioners from making decisions involving a conflict of interest. Conflicts of interest are especially critical in SOEs due to state ownership structures and the involvement of government officials in corporate policymaking, which often creates complex relational dynamics. Decisions by SOE management that benefit personal interests, affiliated parties, or political actors fall outside the scope of BJR. The BJR functions as a legal shield only when decisions are directed exclusively toward the interests of the SOE. Once indications of personal benefit, undue preference, or external intervention approved by management without objective justification are detected, BJR protection collapses.

The third parameter is the requirement that management must make decisions based on adequate and reliable information. The principle of reasonable inquiry obliges the Board of Directors and supervisory organs to analyse relevant data, seek professional opinions when

¹⁶ Cesaria, “Memahami Fiduciary Duty Direksi Berdasarkan Hukum Indonesia.”

¹⁷ Kuswandi Kuswandi et al., “Penerapan Prinsip Business Judgement Rule dalam Putusan Lepas Terkait Tindak Pidana Korupsi Direktur Korporasi,” *Jurnal Hukum Mimbar Justitia* 8, no. 2 (2022): 509, <https://doi.org/10.35194/jhmj.v8i2.3083>.

necessary, and ensure that decisions are made through a rational deliberative process.¹⁸ Article 97(5) of the Companies Law essentially provides that directors are not liable for corporate losses if they can prove that management actions were undertaken based on sufficient information and reasonable considerations. This principle entails several practical consequences:

1. The Board of Directors must establish a decision-making database, including feasibility studies, financial projections, risk assessments, and other analytical documents.
2. The Board of Commissioners/Supervisory Board must actively exercise supervisory authority by requesting explanations and clarifying strategic plans.
3. Due diligence constitutes a minimum standard, particularly for decisions involving investments, procurement, restructuring, or major corporate actions.

BJR protection cannot be granted if decisions are taken hastily, without proper assessment, or based on erroneous information.

The final parameter is the requirement that every decision must remain within the limits of authority mandated by law, the articles of association, and shareholder or government decisions. The BJR does not apply to *ultra vires* acts, namely actions outside the lawful authority of corporate organs. The scope of authority for directors is determined by the Companies Law, the articles of association, and General Meeting of Shareholders (GMS) decisions. In the case of SOE Perum, the limits of authority are more complex, determined by:

- a. the SOE Law;
- b. the government regulation establishing the Perum;
- c. administrative law requirements; and
- d. policies issued by technical ministries.

If a decision exceeds the limits of authority or lacks approval from competent organs, it cannot be protected by the BJR, even if done in good faith or based on adequate analysis.

The BJR plays a crucial role in delineating the liability of SOE directors, particularly in the context of business decisions that inherently involve risk. Within the Indonesian legal framework, Article 97 of the Companies Law serves as the principal normative foundation governing directors' liability. For SOEs, the implications of BJR are broader because the decisions of directors concern not only corporate efficiency but also the state's financial interests and broader public interests. Thus, the application of BJR to SOE directors must balance protection for business innovation and risk-taking with accountability for managing state assets.¹⁹

The BJR establishes specific limits to director liability when corporate losses occur. Under Article 97(3) and (5) of the Companies Law, directors may only be held liable if the loss results from negligence or fault. Therefore, losses arising from reasonably made business decisions do not automatically give rise to personal liability. In the SOE context, these limits are particularly important because SOE losses are often presumed to constitute state financial losses within the meaning of the State Finance Law. Without BJR, directors could face civil and

¹⁸ Kuswandi et al., "Penerapan Prinsip Business Judgement Rule dalam Putusan Lepas Terkait Tindak Pidana Korupsi Direktur Korporasi."

¹⁹ Dina, "Penerapan Prinsip Business Judgement Rule Pada Badan Usaha Milik Negara."

even criminal liability for any unfavourable outcome. Through the BJR, directors retain the ability to take innovative decisions without the persistent threat of criminalization, provided they meet the BJR parameters: good faith, absence of conflicts of interest, adequate information, and decisions within the scope of authority. Consequently, SOE directors are not liable for ordinary business risks but remain liable for losses resulting from gross negligence, abuse of authority, or conduct that clearly exceeds their legal authority.²⁰

A principal function of the BJR is to shield directors from civil lawsuits and criminal charges arising from pure business decisions. Civil claims typically originate from shareholders alleging corporate losses, while criminal charges may arise when such decisions are perceived to cause state losses. The potential criminalization of business decisions is a major concern. Studies show that high-risk decisions are often misclassified as acts causing state losses. The BJR therefore operates as a filter: decisions satisfying BJR elements cannot serve as the basis for civil wrongdoing or corruption charges.

Under the Anti-Corruption Law, particularly Articles 2 and 3, the BJR affects the assessment of whether a decision constitutes an abuse of authority. A decision taken in good faith and based on reasonable considerations cannot be deemed an abuse of authority, even if it results in financial loss. Accordingly, the BJR shields directors from:

1. civil liability for business losses arising from market fluctuations or inherent risks;
2. criminal liability when decisions are legitimate business judgments unmotivated by personal gain.

This protection ensures that directors can pursue innovative and strategic business actions without excessive fear of disproportionate criminal prosecution.

SOEs often undertake national strategic projects – including in energy, infrastructure, transportation, and other strategic sectors – characterized by high financial risk. In such projects, the application of the BJR is decisive for determining whether directors may be held liable. High risk alone does not preclude BJR protection so long as directors:

1. conduct proper due diligence and feasibility studies;
2. obtain professional or independent advice;
3. conduct risk analyses consistent with industry standards;
4. secure approval from relevant organs (GMS, Board of Commissioners, or technical ministries);
5. document the decision-making process thoroughly.

The BJR allows directors to make progressive decisions without undermining the managerial courage required for strategic projects. Without BJR, directors tend toward defensive behavior (risk aversion), compromising the SOE's ability to compete and develop strategic sectors. Case examples – such as the Pertamina LNG matter – illustrate how misunderstanding of the BJR can lead to the criminalization of strategic business decisions. Proper application of the BJR distinguishes honest managerial mistakes from true abuses of authority.²¹

²⁰ Muhammad Mirza Habibie et al., *Business Judgment Rule in the Amendment of the State-Owned Enterprises Law*, 4 (n.d.).

²¹ Bohumil Havel and Kateřina Ronovská, "Business Judgement Rule in Foundation Governance," *Trusts & Trustees* 31, no. 4 (2025): 141–45, <https://doi.org/10.1093/tandt/ttaf015>.

The application of the BJR extends beyond directors and directly affects the liability of the Board of Commissioners in SOE Persero and the Supervisory Board in SOE Perum. Theoretically, supervisory organs play a central role in ensuring that managerial actions adhere to good corporate governance (GCG) principles. Accordingly, BJR protection applies to supervisory organs only when they demonstrate adequate oversight. Supervisory organs receive BJR protection only when they exercise active monitoring. Article 108(1) of the Companies Law mandates the Board of Commissioners to supervise management policies and provide advice to directors. This duty is reinforced by Articles 52 and 53 of the amended SOE Law (2022), which require supervisory organs to ensure that SOE management adheres to professionalism, prudence, and accountability.

Corporate-law doctrine provides that supervisory organs receive BJR protection only when they engage actively through attendance at meetings, understanding relevant information, and offering informed advice. Robert C. Clark argues that BJR protection is unavailable when supervisory organs “fail to make reasonable minimal efforts to understand corporate policies”.²² Consequently, in the SOE context, supervisory organs must demonstrate due diligence oversight before benefiting from BJR protection.

Failure to exercise supervision according to statutory standards may result in liability. Supervisory negligence may take the form of:

1. Misfeasance; supervision carried out improperly, e.g., approving high-risk investment projects without sufficient analysis.
2. Nonfeasance; failure to supervise, e.g., ignoring risk reports or failing to attend key meetings.

Article 114(3) of the Companies Law provides that commissioners bear personal liability if they neglect their supervisory duties causing corporate loss. A similar rule applies to Perum through Article 53 of the SOE Law. Thus, if supervisory organs cannot demonstrate prudent oversight, BJR cannot serve as a basis for exculpation, exposing them to civil or administrative liability.

The application of BJR to supervisory organs differs conceptually between Persero and Perum:

1. SOE Persero
 - a) Fully subject to the Companies Law; supervisory standards align with private corporate fiduciary duties.
 - b) Greater room for BJR protection due to profit-oriented and competitive business nature.
 - c) Liability focuses on professional negligence rather than administrative law.
2. SOE Perum
 - a) Bound not only by corporate fiduciary standards but also by public-service obligations and administrative law.
 - b) BJR protection is narrower, as decisions are evaluated not solely as business judgments but as public-service actions.

²² Robert Charles Clark, *Corporate Law* (Little, 1986).

- c) Supervisory liability may arise from abuse of authority under administrative law.

Supervisory organs therefore play a key role in ensuring that managerial decisions qualify for BJR protection. Failure to exercise adequate supervision may eliminate their entitlement to BJR protection and expose them to civil, administrative, or criminal liability, particularly in strategic projects involving substantial potential state losses.

Conceptually, the BJR is a doctrine that ordinarily functions in the realm of civil corporate law to protect business decisions made in good faith and with reasonable care. However, in the development of Indonesian law, especially in corruption cases involving SOEs, the doctrine is increasingly invoked as an instrument to distinguish lawful business decisions from abuses of authority that may incur criminal liability. Although BJR does not eliminate criminal liability, it affects assessments of mens rea and the legality of managerial conduct.

In criminal law, liability requires not only harm (loss) but also culpability in the form of intent (*dolus*) or negligence (*culpa*). The BJR is relevant because it can show that decisions were undertaken through a legitimate business process. Even where decisions lead to losses, mens rea is not satisfied if it is proven that:

1. the decision was based on adequate information,
2. no conflict of interest existed,
3. the decision was within the scope of authority, and
4. the decision was directed toward corporate interests.

The Supreme Court has held in several cases that losses resulting from reasonable business decisions do not automatically establish criminal liability absent malicious intent or abuse of authority. This approach aligns with the principle that criminal law is an *ultimum remedium* and should not criminalize business risk.

A key issue in the SOE context is distinguishing between “state losses” resulting from pure business risks and losses resulting from abuse of authority. Under the BJR, business losses constitute:

- a. consequences inherent to market dynamics,
- b. results of business uncertainty,
- c. failures that could not be foreseen despite proper procedures.

Conversely, losses qualify as state losses caused by abuse of authority when management:

- a. ignores mandatory procedures,
- b. makes decisions for personal or third-party benefit,
- c. acts outside legal authority,
- d. disregards risk warnings or audit findings.

Thus, the BJR becomes a crucial analytical tool in law enforcement to determine whether losses reflect entrepreneurial risk or corrupt conduct.

In corruption cases involving SOE managers, the BJR serves as an objective parameter for evaluating the legality of business decisions. Its relevance is grounded in several considerations:

1. SOEs operate like private corporations; thus, not all SOE losses constitute state losses with criminal implications, especially in Persero.
2. The BJR helps investigators, prosecutors, and judges assess the decision-making process rather than merely the outcome. Result-oriented assessments risk penalizing managers who acted professionally.
3. BJR prevents the criminalization of public policies and high-risk decisions, particularly in national strategic projects requiring innovation and strategic initiative.
4. The BJR supports a defense argument that decisions lacked malicious intent, abuse of authority, or personal gain.

However, the relevance of BJR in corruption cases does not imply that all business decisions are immune from criminal liability. When conflicts of interest, data manipulation, or procedural violations are found, BJR does not apply because such decisions are no longer legitimate business judgments.

Accordingly, although the BJR is not a criminal-law doctrine, its existence directly influences criminal-liability assessments in the SOE context. The doctrine protects honest business mistakes without impairing the state's ability to prosecute abuses of authority that harm public finances. To create accountable SOE governance that still permits professional discretion in decision-making, the implementation of the BJR requires a more structured normative and institutional design. This ideal model ensures that SOE managers receive adequate protection when making business decisions involving commercial risk, without reducing the state's capacity to address abuses of authority. At a minimum, the ideal model comprises three key elements.

a. Standardization of Risk-Based Decision-Making

The first parameter for effective BJR implementation is the standardization of decision-making processes through measurable risk assessments. In many jurisdictions, including the OECD Guidelines on Corporate Governance of State-Owned Enterprises, the success of BJR strongly depends on the presence of clear, well-documented risk evaluations. In the SOE context, the ideal model requires:

1. formal documentation of risk analysis for each strategic decision;
2. assessment of alternatives, financial projections, legal implications, and market considerations prior to decision-making;
3. use of uniform risk-management methodologies across SOEs (e.g., ISO 31000 or Ministry of SOEs standards);
4. integration of risk assessments into decision papers.

This standardization ensures that high-risk decisions adhere to professional standards so that, even if losses arise, they remain eligible for BJR protection as reasonably made business decisions.

b. Strengthening the Supervisory Role through Comprehensive Documentation

The second element is systematic strengthening of the supervisory role in SOE Persero and Perum through more comprehensive documentation of oversight. The ideal model requires:

1. detailed and audit-ready minutes of meetings documenting supervisory activities;
2. written advice or warnings for high-risk decisions;
3. operational strengthening, not merely formal establishment—of supervisory committees (Audit Committee, Risk Management Committee);
4. documentation demonstrating sufficient inquiry by supervisory organs.

Robust documentation ensures that supervisory organs may benefit from BJR protection while minimizing the risk of negligence-based liability.

- c. Harmonization of the SOE Law, Companies Law, Anti-Corruption Law, and State Finance Law

The third and most fundamental element is cross-statute harmonization. BJR implementation in SOEs often faces obstacles due to normative disharmony, particularly concerning the concept of state financial losses, the legal character of SOEs as private actors, and the risk of criminalization under the Anti-Corruption Law. The ideal model requires harmonization on three fronts:

1. Harmonization of the SOE Law and Companies Law
 1. Clear affirmation that SOE Persero are fully subject to private-law corporate governance and therefore entitled to full BJR protection.
 2. Ensuring that corporate fiduciary duties apply consistently.
2. Integration of the “state-loss” concept in the State Finance Law
 1. Corporate losses of SOEs should not automatically constitute state losses, particularly for Persero.
 2. State losses should be limited to losses resulting from abuse of authority.
3. Clarification of the limits of criminalization under the Anti-Corruption Law
 1. Articles 2 and 3 should be interpreted in light of BJR to avoid criminalizing business risk.

Law enforcement must distinguish policy errors from criminal intent in accordance with the principle of *ultimum remedium*.

4. Conclusions

The discussion in this study demonstrates that the Business Judgment Rule (BJR) plays a critical role as a standard for assessing business decisions within the corporate legal framework. Its position is reinforced by the provisions of the Limited Liability Companies Law, particularly through the imposition of fiduciary duties such as the duty of care and the duty of loyalty, which establish that directors and commissioners cannot be held liable insofar as business decisions are made in good faith, free from conflicts of interest, based on adequate information, and within the scope of lawful authority. The amendments to the State-Owned Enterprises Law, which removed the provision excluding BUMN organs from the status of public officials, have significant consequences for the liability of the Board of Directors, Board of Commissioners, and Supervisory Board. These regulatory shifts heighten the demand for professionalism and accountability while simultaneously creating the need to harmonize the

BUMN Law with the Limited Liability Companies Law. This tension is particularly evident in the differing application of BJR in BUMN Persero, which is subject to private law and therefore benefits from a comprehensive application of the doctrine, compared to BUMN Perum, which is governed by administrative law and therefore experiences a more limited application, one that is prone to potential disharmony with the Anti-Corruption Law and the State Finance Law. This study shows that the BJR functions as a boundary of legal liability for BUMN directors, commissioners, and supervisors through several key parameters: good faith, absence of conflicts of interest, a decision-making process grounded in adequate information, and actions taken within the scope of authority. For directors, BJR provides protection from civil lawsuits and criminal prosecution, so long as any resulting losses constitute reasonable business risks. For the Board of Commissioners and the Supervisory Board, similar protection is available only when supervisory functions are exercised actively and properly documented. In the context of criminal law, BJR does not eliminate liability but influences the assessment of culpability, particularly when distinguishing state losses arising from legitimate business risk from those caused by abuse of authority. Accordingly, an ideal model for applying BJR in BUMN requires the standardization of risk assessment, strengthened documentation of supervisory activities, and harmonization of the BUMN Law, the Companies Law, the Anti-Corruption Law, and the State Finance Law to ensure legal certainty for decision-makers while maintaining state accountability in managing public assets.

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