



# Legal Review of Positive Fictive Inconsistency in Government Regulations on the Implementation of Risk-Based Business Licencing

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Article	Abstract
<b>Keywords:</b> <i>Risk-Based Business Licensing (OSS-RBA), OSS System, Positive Fiction, State Administrative Decision</i>	<i>This study examines the OSS-RBA licensing process, which adapts the positive fictitious principle from the Government Administration Law (UUAP) for KTUN implementation. PP 5/2021 underlies the OSS system, adopting this principle. The study addresses issues with OSS licensing applications due to inconsistencies with positive fictitious regulations. Using a normative juridical method with statute, historical, case, and conceptual approaches, it relies on legislation and secondary materials such as books and journals. Indonesia's policies now use technology, including OSS-RBA in PP 5/2021, replacing PP 24/2018. Despite the positive fictitious concept in PP 24/2018 and UUAP, PP 5/2021's implementation is inconsistent, causing licensing delays and legal uncertainty, hindering investment. Improving OSS-RBA is crucial to effectively apply the AUPB principle, creating a transparent, efficient bureaucracy and increasing legal certainty for businesses. This supports sustainable economic growth and enhances Indonesia's global competitiveness. Inconsistencies between licensing practices and regulations like PP 5/2021, and the absence of a Presidential Regulation on legally granted KTUN forms, cause legal uncertainty. Legal remedies include legal construction, ombudsman, residual theory, and establishing a special institution for positive fictitious cases.</i>

## INTRODUCTION

### 1. Background

Indonesia is a country governed by the rule of law that implements various state administrative policies in accordance with the development of economic globalization. To adapt to advances in technology and information, the government has issued several policies to improve the efficiency of bureaucratic administration through electronic technology systems. One of the main policies adopted is the ratification of Government Regulation Number 5 of 2021 concerning the Implementation of Risk-

Based Business Licensing, known as *the Online Single Submission Risk-Based Approach (OSS-RBA)*. This Government Regulation 5/2021 replaces Government Regulation 24/2018 concerning Electronically Integrated Business Licensing Services, which is based on the implementation of Article 25 of Law Number 25 of 2007 concerning Investment and Articles 6 and 7 of Law Number 23 of 2014 concerning Regional Government.

Government Regulation (PP) 5/2021 is a derivative of Law Number 11 of 2020 concerning Job Creation, which was later revoked and replaced by Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation. This regulation was then enacted as Law Number 6 of 2023, known as the Job Creation Law (UUCK). The main difference between PP 5/2021 and PP 24/2018 is the system used and the classification of business licensing applications. PP 5/2021 uses the *OSS-RBA system*, while PP 24/2018 uses OSS 1.1.

The implementation of the administrative system in Indonesia reflects the application of the country's legal system. Public administration is an integral part of the government's duties and functions as a state administrator and public servant. Currently, requests for State Administrative Decrees (KTUN) have increased significantly, indicating a surge in public demand for legalization of various aspects of life issued by state officials.

The definition of KTUN first appeared in Law Number 5 of 1986 concerning State Administrative Courts, which has been amended several times, most recently by Law Number 51 of 2009. Article 1 number 9 states that "State Administrative Decisions are written decisions issued by State Administrative Agencies or Officials, containing state administrative legal actions based on statutory regulations, are concrete, individual, and final and have legal consequences for individuals and civil legal entities." This definition is reaffirmed in Law Number 30 of 2014 concerning State Administration, which was amended by Article 1 number 7 of Part Two, Chapter XI of Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation to Become Law.

State administrative decisions (KTUN) encompass various forms and classifications according to legal experts. Utrecht classifies KTUN into several types, such as positive and negative provisions, declaratory and constitutive, express and permanent provisions, and provisions in the form of dispensations, permits, licenses, and concessions. (Chaesar nd). In the context of business licensing, KTUN (State Officials) take the form of permits and licenses, which are required to meet the legal requirements for a business under applicable regulations. Business licensing is currently regulated through the *OSS system*, defined in Article 1 number 21 of Government Regulation 5/2021 as an integrated electronic system for implementing risk-based licensing.

In Indonesian administrative law, the concepts of 'negative fictitious' and 'positive fictitious' decisions are recognized. Negative fictitious decisions, regulated in Article 3 of the PTUN Law, state that a State Administrative Court (KTUN) application is deemed rejected if it exceeds the time limit. The transformation of administrative law brought about changes with the adoption of the positive fictitious concept in Article 53 of the UUAP, which considers a request granted if it exceeds the time limit. Although the UUAP does not explicitly repeal the negative fictitious concept, the principle of *lex posteriori derogate legi priori* overrides it because the UUAP is newer. (Herlangga Masrie 2014) . The Supreme Court strengthened this through Supreme Court Circular Letter Number 1 of 2017.

The concept of positive fictitiousness aims to support the General Principles of Good Governance (AUPB), promoting transparent and efficient governance. This concept was adopted in Government Regulation 24/2018 and Government Regulation 5/2021, although in practice, the implementation of *the OSS system* sometimes runs poorly. Some applicants experienced delays in issuing permits, even though the deadline had passed, demonstrating an inconsistency with the principle of positive fictitiousness. This inconsistency creates legal uncertainty for permit applicants and hinders state investment. This study further examines this inconsistency, which has the potential to slow down investment rotation in the capital investment sector.

## 2. Formulation of the problem

1. What are the legal consequences of business licensing applications if the OSS system does not issue applications automatically (fictitious)?
2. What legal remedies are available for resolving positive fictitious cases in business licensing issues (OSS-RBA) following the enactment of the Job Creation Law?

## METHOD

This journal article was written using types of normative legal research. Normative legal research is a study of legal principles. Normative legal research is legal research that uses secondary data sources or data obtained through library materials. (Mahmud Marzuki 2013) . The approaches used in writing this journal article are the statute approach, the *historical approach*, the *case approach*, and the conceptual approach. The types of legal materials used in writing this journal are primary legal materials in the form of statutory regulations and secondary legal materials.

The collection of legal materials used is using library study techniques. This research will utilize a literature search related to the title and problem formulation. A bibliographical study will be conducted within existing legal materials, including primary and secondary sources, as well as tertiary sources. The collected legal materials will then be classified into chapters and subchapters, arranged sequentially by topic, and analyzed using descriptive methods.

Research using descriptive methods aims to provide an overview of the validity of the positive fictitious principle in electronic system decisions issued by the electronic system (*OSS-RBA*).

## RESULTS AND DISCUSSION

### 1. Legal Consequences of Business Licensing Applications If the *OSS System* Does Not Issue Applications Automatically (Fictitious)

Business licensing is a crucial element in the operational legality of establishing and operating businesses. As a nation governed by the rule of law, Indonesia guarantees legal certainty as an inherent right of the people, including in the area of business licensing. The government, in its capacity as the sovereign, plays a crucial role in the formulation and implementation of laws, which must prioritize the objectives of the law. In the context of business licensing applications, the issuance or denial of a permit carries specific legal consequences due to the nature of permits, which fall under the classification of State Administrative Decrees (KTUN) as the result of unilateral government action.

Sjahran Basah defines permission as:

"A permit is a one-sided state administrative legal act that applies regulations in concrete matters based on requirements and procedures as stipulated by statutory provisions (Ridwan 2006) ."

In government administrative actions, known as government actions (*Rechtsbandelingen*), there are two types of legal actions: one-sided legal actions (*Eenzijdige Publiek Rechtsbandelingen*) and two-sided legal actions (*Tweezijdige Publiek Rechtsbandelingen*). One-sided legal action refers to a unilateral government decision that results in an individual or general decision. On the other hand, a two-sided legal action involves mutual agreement between the two parties involved in carrying out the legal action (Teenager 2017) . Therefore, business licensing is a KTUN that arises as a result of one-sided government legal action.

The legal consequences of government legal actions, including business licensing, impact the subjects addressed by the KTUN. Soeroso, in his book "Pengantar Ilmu Hukum," states that:

"Legal consequences are actions taken to achieve a desired outcome, as regulated by law. This action is called a legal action. Therefore, legal consequences are the result of a legal action (Soeroso 2021) ."

*OSS-RBA* system was developed to realize the constitutional mandate of Article 33 paragraph (4) of the 1945 Constitution, which states that the national economy is organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental awareness, independence, and maintaining a balance of progress and national economic unity. The government's efforts to attract investment to Indonesia, which is expected to have a

positive impact on economic growth and the welfare of the people, are realized through the implementation of an efficient business licensing system.(Marbun 2022) .

The implementation of business licensing through *the OSS (Investment Information System)* is part of an effort to fulfill constitutional mandates and simplify the investment process in Indonesia. *The OSS* itself is based on Law Number 25 of 2007 concerning Investment (UUPM). However, business licensing is not only viewed from the legal perspective of business activities or economic investments, but also as a State Administrative Decree (KTUN) in the form of a license that must comply with applicable state administrative laws in Indonesia (Suprpto, Roesma Sya'bana, and Valentino 2019) .

In state administrative law, the principle of *lex silencio is recognized* , which refers to the silence of state administrative officials. In this context, Indonesia adopts the concept of positive fiction, as regulated in Law Number 30 of 2014 concerning Government Administration (UUAP), which was amended by Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into Law (UUCK). According to Article 53 of the UUAP, if a government agency or official does not issue or make a decision within five working days after a complete application is received, the application is deemed legally granted. (Wulandari 2020) .

In derivative regulations, such as Government Regulation Number 24 of 2018 concerning Electronically Integrated Business Licensing Services (PP 24/2018), the principle of positive fictitiousness is also adopted. For example:

- Article 33 paragraph (5): The land office is deemed to have given approval for technical considerations if it does not submit them within ten days.
- Article 42 paragraph (4): Technical considerations are deemed to have been given in accordance with the application if they are not submitted within ten days.
- Article 53 paragraph (7): Approval of the UKL-UPL recommendation is deemed to have been fulfilled if it is not determined within the specified time.

These articles indicate that the "deemed" provision means that the positive fictitious principle is applied to ensure legal certainty and avoid protracted service.

Government Regulation 24/2018 has been replaced by Government Regulation 5/2021, a derivative regulation of Law Number 11 of 2020 concerning Job Creation. Government Regulation 5/2021 also adopts the principle of positive fiction, for example:

- Article 180 paragraph (4): Approval of suitability of spatial utilization activities is issued automatically by the OSS System if there is no decision within 20 days.
- Article 182 paragraph (8): Approval of the suitability of marine space utilization activities is issued automatically by the OSS System if there is no decision within 20 days.

- Article 199 paragraph (1): The OSS system includes a statement that the Standard Certificate has been automatically verified if there is no notification of verification results.

The change in the phrase from "deemed" to "issued automatically by the OSS System" in PP 5/2021 does not change the positive fictitious principle applied, namely that an application is deemed granted if no decision is made within a certain time.

The implementation of the positive fictitious principle in business licensing applications through the OSS (Online Shopping Center) aims to accelerate economic growth and public welfare. However, there is a mismatch between expectations (*das sollen*) and reality (*das sein*) on the ground. Lita Paromita Siregar stated in her seminar that many companies face obstacles due to "waiting for verification" that are never completed, hampering company operations. This reflects a mismatch between regulatory provisions and implementation on the ground (Paromita Siregar 2022).

Article 53 of the UUAP before the amendment required the PTUN to decide on positive fictitious applications, but after the amendment by the UUCK, this authority was removed and there is no presidential regulation that regulates the form of KTUN determination that is considered legally granted. The Director General of the Military and State Administrative Courts issued SE Number 2 of 2021 as a guideline for handling case registration to obtain a decision after the UUCK (Herlangga Masrie 2014). However, SE 2/2021 is not always in line with judicial practice, as seen in Decision Number 2/P/FP/2021/PTUN-JKT which ruled that positive fictitious applications were inadmissible, confirming that applicants no longer need to process in court to obtain a decision that is considered legally granted.

In the OSS system, discrepancies between regulations and their implementation still occur, causing legal uncertainty for licensing applicants. Fernando M. Manullang in his book states that legal certainty is the implementation of the law according to its wording so that the public can ensure that the law is implemented (Marbun 2022). The positive fictitious principle in the KTUN is an implementation of the General Principles of Good Governance (AUPB) regulated in Article 10 paragraph (1) of the UUAP, including the principle of legal certainty which emphasizes compliance with laws and regulations, propriety, consistency, and justice in government administration policies (Munawaroh 2023).

Important conclusions from this discussion include:

- a. Changes in UUA P: The provisions regarding positive fictitious decisions have been changed, including reducing the time limit from ten days to five days.
- b. Elimination of PTUN's authority: The PTUN's obligation to decide on positive fictitious applications has been removed, but there is no presidential regulation yet that regulates the form of KTUN determination that is considered legally granted, giving rise to legal uncertainty.



- c. Inconsistencies in OSS: There are inconsistencies between the implementation of business licensing applications through the OSS System and the provisions in PP 5/2021, causing legal uncertainty for applicants.

The legal consequence of this uncertainty is legal uncertainty for licensing applicants, due to the lack of regulations governing the resolution of cases where the *OSS system* does not automatically issue applications. This inconsistency hinders the implementation of the positive fictitious principle and creates protracted legal uncertainty, impacting company operations and the investment climate in Indonesia.

## **2. Legal Efforts to Settlement Positive Fictitious Cases in Business Licensing Issues (*OSS-RBA*) Following the Enactment of the Job Creation Law**

The implementation of Government Regulation No. 5 of 2021 concerning business licensing is often inconsistent with normative provisions, harming businesses using the *OSS-RBA system*. The author explains legal remedies that can be taken to resolve positive fictitious cases after the enactment of the Job Creation Law (UUCK), using a normative legal approach.

In writing this journal article, the author will provide several forms of legal efforts that can be made to resolve positive fictitious cases after the UUCK came into effect, including:

### **A. Legal Construction**

The Legal Construction Method is a crucial foundation in law enforcement, involving reasoning and interpretation of existing regulations. In the context of business licensing through the *Online Single Submission-Risk Based Approach (OSS-RBA) system*, where regulatory ambiguity or gaps often occur, leading to positive fictitious practices, this method is crucial for finding appropriate solutions (Muwahid 2017).

First, *the Argumentum Per Analogium* (Analogy) method opens the way to find parallels between situations that have not been specifically regulated and similar cases that have been regulated by law. In this case, identifying the general essence of regulated events or legal actions can serve as a basis for applying the same principles to situations not yet covered by regulation. For example, by referring to positive fictitious cases in other regulated licensing areas, one can identify approaches that can be applied in the context of business licensing through *the OSS-RBA*.

Furthermore, the Legal Refinement or Concretization method allows for narrowing the scope of overly broad and abstract norms so that they can be applied to specific situations. In the case of resolving positive fictitious cases, this means conducting a more in-depth analysis of existing regulations to understand their true meaning and apply them to specific cases. For example, identifying key elements within regulations relevant to positive fictitious law and then applying them to concrete case resolutions in the field.

However, the use of legal construction methods must also be carefully considered. While they can provide adequate solutions in complex situations, overly broad or subjective legal interpretations can also carry their own risks. Therefore, a balance is needed between flexibility in legal interpretation and the legal certainty necessary to maintain justice and stability.

Furthermore, it is also important to consider other aspects of resolving positive fictitious cases, such as the role of relevant government agencies, public oversight, and effective law enforcement mechanisms. In addition to providing solutions through legal construction methods, efforts are also needed to strengthen regulations and adequate law enforcement infrastructure to effectively prevent positive fictitious practices.

Thus, the legal construction method has become a crucial tool in addressing the issue of positive fictitiousness in business licensing through the OSS-RBA following the enactment of the Job Creation Law. However, a comprehensive and sustainable solution requires collaboration between various parties and a holistic approach to addressing the root causes of the problem.

#### B. Administrative Efforts Through the Ombudsman Institution

Administrative resolution through the Ombudsman is an integral part of efforts to maintain accountability and transparency in government administration, particularly in the context of public services such as business licensing. With the evolution of democracy in Indonesia, the Ombudsman was established as a forum to ensure the government is accountable for its performance to the people. In this regard, the Ombudsman plays a crucial role as an independent supervisor, tasked with reviewing government administrative actions, including those related to public services, including business licensing.

The establishment of the Ombudsman in Indonesia is inseparable from the context of reform and the spirit of protecting the public from maladministration practices that may occur within the bureaucracy. The law governing the Ombudsman authorizes this institution to receive reports from the public regarding alleged violations or irregularities in public services, including issues related to business licensing. Thus, the Ombudsman can conduct in-depth investigations into reported cases and provide recommendations for improvement to the relevant agencies.

Amid government efforts to improve the business licensing process through the implementation of *the OSS-RBA (Online Business License) system (OSS-RBA)*, findings from the Ombudsman regarding maladministration practices highlight that challenges remain that need to be addressed. While *the OSS-RBA* is expected to increase efficiency and transparency in business licensing, if not implemented properly, it could potentially create complications and dissatisfaction for business license applicants (Widyaning 2021).



The Ombudsman, as an independent oversight body, can assist the public experiencing difficulties or dissatisfaction with the business licensing process by providing an open and transparent complaint channel. Through thorough investigations and audits, the Ombudsman can identify the root causes of problems and provide constructive recommendations to the government for improvements and enhancements in the administration of business licensing.

Furthermore, the Ombudsman's role extends to preventative measures, providing advice and guidance to relevant government agencies to improve the overall quality of public services. Thus, the Ombudsman serves not only as a reactive law enforcer but also as a proactive agent of change in improving governance.

However, while the Ombudsman plays a crucial role in maintaining government accountability and providing protection to the public, it also faces limitations in capacity and resources. Therefore, to ensure the effectiveness and efficiency of administrative resolution through the Ombudsman, strong support from the government, the public, and various other stakeholders is required (Hastuty Christin Nalle, Yohanes, and Ratu Udju 2023) .

In the context of this research, it is important for communities experiencing difficulties or dissatisfaction with the business licensing process through *the OSS-RBA* to utilize the Ombudsman as a mechanism to resolve their issues. In this way, the Ombudsman can act as a committed partner in ensuring that public services provided by the government are transparent, accountable, and responsive to the needs and interests of the community.

#### C. The Use of Residue Theory in State Administrative Law

The residual theory explains that the scope of state administrative law is the remainder of the legal scope after additions by constitutional law, substantive criminal law, and substantive civil law (Utama 2018) . This theory shows that state administrative law has a different scope from constitutional law. The popular residual theory in Indonesian state administrative law comes from Cornelis Van Vollenhoven, who links it to the concept of *Trias Politica* . According to Vollenhoven, state administration includes a series of administrative positions led by the government to carry out functions not assigned to courts, legislatures, or lower jurisdictions of the central government (Razy 2020) .

In the context of judicial authority, the residual theory is also applied. Law Number 14 of 1970 in conjunction with Law Number 35 of 1999 regulates judicial authority based on the principle that special courts only handle certain cases stipulated by law. The competence of general courts is determined using the residual theory, namely that areas not delegated to special courts fall within the scope of general court competence (Ety Pretywaty 2019) .

In relation to the issues raised in this study, where the PTUN's authority was removed in Article 53 of the UUAP, as amended by the UUCK, applicants for cases of fictitious positive decisions can file applications through general courts under the residual theory. The residual theory is used when the PTUN no longer accepts applications for fictitious positive cases and rejects all submitted cases.

To address the current regulatory ambiguity regarding the form of decision deemed legally granted, the author recommends that the government immediately issue a Presidential Regulation concerning Article 53 of the UUAP, as amended by the UUCK. This will provide a legal basis that guarantees legal certainty for the public in the implementation of PP 5/2021 and the UUAP, as amended by the UUCK.

D. Establishment of a Special Institution for the Settlement of Positive Fictitious Cases

Supreme Court Regulation Number 8 of 2017 (PERMA 8/2017) concerning Guidelines for Procedural Procedures for Obtaining Decisions and/or Actions by Government Agencies or Officials remains in effect in Indonesia. Although Article 53 of UUAP 30/2014 was amended by UUCK 6/2023, the closing provisions of UUCK 6/2023 state that all previous derivative regulations remain in effect. This is also supported by Circular Letter 2/2021 and the regulatory database on the BPK website, so that the resolution of positive fictitious cases can still be pursued through the PTUN.

However, the changes to UUCK 6/2023 have created a legal vacuum regarding the resolution of positive fictitious cases, as the Presidential Regulation concerning the form of decision deemed legally granted/positive fictitious is still pending. To address this, it is necessary to evaluate relevant regulations and revoke irrelevant ones following the amendments to UUAP.

As a recommendation, the government could establish a special institution authorized to resolve positive fictitious cases hierarchically, from the central government down to the regional governments. This would provide legal certainty to State Administrative Court (KTUN) applicants and prevent maladministration by state administrative officials caused by unclear regulations regarding the resolution of positive fictitious cases.

## CONCLUSION

- a. Business licensing applications through the *OSS system* that are not issued automatically (fictitious) create legal uncertainty for applicants, which contradicts the principle of positive fictitiousness stipulated in Law Number 30 of 2014 concerning Government Administration and Government Regulation 5/2021 concerning the Implementation of *the OSS*. This provision states that if the government does not issue a decision within the specified time, the application is deemed granted. However, in practice, the

inconsistency between regulations and their implementation, as well as the lack of a Presidential Regulation governing the form of positive fictitious decisions, has hampered the operations of many business actors. This demonstrates inconsistency and a legal vacuum that impacts legal certainty, which should be guaranteed by the government to support the investment climate and national economic growth.

- b. Following the enactment of the Job Creation Law (UUCK), legal remedies available for resolving positive fictitious cases in business licensing issues through the OSS-RBA (Online Business License) demonstrate inconsistencies between its provisions and implementation. Legal construction methods, such as *Argumentum Per Analogium* and Legal Narrowing, are used to fill regulatory gaps. The elimination of the PTUN's authority in Article 53 of the UUAP, as amended by the UUCK, creates uncertainty, although this authority can still be exercised under PERMA 8/2018 and SE 2/2021. Other alternatives include the use of discretion by government officials and resolution through the Ombudsman in cases of maladministration. The residual theory can also be used to file an application through the general courts if the PTUN no longer handles positive fictitious cases. It is crucial for the government to immediately issue a Presidential Regulation regarding Article 53 of the UUAP, as amended by the UUCK, and to consider establishing a special institution to resolve positive fictitious cases hierarchically from the central to the regional levels.

## SUGGESTION

- a. To address legal uncertainty in business licensing applications through the *OSS system*, the government needs to immediately issue a Presidential Regulation governing the form of positive fictitious decisions. Furthermore, coordination between relevant agencies is needed to ensure compliance with regulations and their implementation, as well as increase transparency and accountability in the licensing process. This is crucial to ensure legal certainty for businesses, thereby supporting a conducive investment climate and encouraging sustainable national economic growth.
- b. The government needs to immediately issue a Presidential Regulation regarding the form of decisions deemed legally granted (positive fictitious) to fill the legal vacuum and provide legal certainty for business actors. In addition, improving the competence of government officials through ongoing training is crucial so that they understand and implement regulations related to *the OSS-RBA* properly, avoid maladministration, and use discretionary authority appropriately. Strengthening the role of the Ombudsman in overseeing the implementation of *the OSS-RBA* and the establishment of a special institution for resolving positive fictitious cases will help provide legal certainty for the public. Evaluation and revision of outdated regulations,

transparency and integration of the *OSS-RBA system*, outreach and assistance for business actors, and ongoing monitoring and evaluation of *the OSS-RBA implementation* are also essential to ensure this system runs according to its objectives, identify and resolve emerging obstacles, and support a conducive investment climate in Indonesia.

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