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The Evolution of Positive Fictitious in Risk-Based Business Licensing: From De Jure Approval to Administrative Decision Issuance

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Abstract. *The implementation of positive fictitious decisions (lex silencio positivo) in Indonesian business licensing has undergone a significant transformation, shifting from judicially confirmed legal approval to automatic administrative issuance through the OSS-RBA system. This development raises concerns regarding the consistency of its legal construction and the realization of substantive legal certainty. This study aims to examine the doctrinal consistency of positive fictitious decisions and their implications for legal certainty in risk-based business licensing. It employs normative legal research using statutory, historical, conceptual, and comparative approaches, examining Law Number 30 of 2014 on Government Administration, Law Number 11 of 2020 on Job Creation, Law Number 6 of 2023, and Government Regulation Number 28 of 2025. The analysis applies Gustav Radbruch's theory of legal values and Jan Michiel Otto's five elements of real legal certainty. The findings reveal that although the normative principle remains intact, its underlying purpose, beneficiaries, control mechanisms, and juridical construction have shifted toward administrative deregulation. Consequently, the mechanism provides temporal predictability but insufficient substantive legal certainty. This study contributes a conceptual assessment of this transformation and recommends restoring effective legal remedies while limiting automatic approval for licenses involving complex technical assessments.*

Keywords: *Administrative Law; Legal Certainty; Lex Silencio Positivo; Risk-Based Business Licensing; OSS-RBA.*

1. Introduction

The Positive Fictitious Decision (fictitious approval or tacit authorization) is a concept derived from the doctrine of *lex silencio positivo* and was adopted into the Indonesian administrative legal system through Law Number 30 of 2014 concerning Government

Administration (Simanjuntak, 2017). The doctrine of *lex silencio* essentially requires government agencies and/or officials to issue decisions or take actions on applications within the time limits prescribed by laws and regulations (Heriyanto, 2019). If this obligation is not fulfilled, the application is deemed legally approved in accordance with the applicable laws and regulations. This doctrine emerged as a response to a longstanding problem in administrative law, namely how to protect citizens from the passivity of state officials whose inaction cannot be challenged because it does not result in any formal decision.

The regulation of Positive Fictitious Decisions in Indonesia is set out in Article 53 paragraphs (2) and (3) of the Government Administration Law, which stipulate that if a government agency and/or official fails to issue a decision or take action within the prescribed period, the application is deemed legally granted (Government Administration Law, 2014). From a doctrinal perspective, the *ratio legis* of this provision is to protect citizens by establishing fictitious approval as a legal instrument to address maladministration in the form of official delays or inaction, while also embodying the principles of legal certainty and good public service within the framework of the rule of law (Ridwan, 2016). A distinctive feature of the 2014 legal framework was the inclusion of judicial safeguards, allowing applicants to submit an application to the State Administrative Court (*Pengadilan Tata Usaha Negara* or PTUN) to obtain a judicial determination declaring their applications legally granted. The applicable procedural framework was subsequently elaborated in Supreme Court Regulation Number 8 of 2017.

These regulations subsequently underwent fundamental changes following the enactment of Law Number 11 of 2020 concerning Job Creation, which was later established as Law Number 6 of 2023. These changes amended the framework of Article 53 of the Government Administration Law by removing the mechanism for submitting an application to the State Administrative Court as a follow-up to an application deemed legally granted. The absence of such jurisdiction was subsequently reaffirmed through Supreme Court Circular Letter Number 5 of 2021, which states that disputes concerning Positive Fictitious Decisions no longer fall within the jurisdiction of the State Administrative Court. This measure has, however, been considered contrary to Article 53 paragraph (3) of the Government Administration Law and Article 10 of Law Number 48 of 2009 concerning Judicial Power, which prohibits courts from refusing to examine cases submitted to them (Navisa et al., 2026). The regulatory change therefore does not merely concern procedural jurisdiction, but also affects the legal position of applicants after an application is deemed legally granted. The removal of judicial determination raises the question of what legal mechanism subsequently provides certainty regarding the status and enforceability of the applicant's rights.

The amended provisions were subsequently implemented in the administration of Risk-Based Business Licensing through Government Regulation Number 28 of 2025. Under

this regulation, for certain types of licenses subject to the Positive Fictitious Decision mechanism, if the service period (Service Level Agreement/SLA) expires without a response, the Business License is no longer merely "deemed granted" as a legal fiction awaiting a judicial determination. Instead, it is directly issued as a definitive licensing document through the Online Single Submission Risk-Based Approach (OSS-RBA) system. This shift in the legal effect from a presumptive legal status to a concrete administrative decision that is actually issued raises a fundamental conceptual question as to whether the term "fictitious" remains appropriate or whether this development instead signifies a shift in the conceptual characteristics of the Positive Fictitious Decision itself (Spaltani, 2024). In this context, the issue is not simply whether the electronic system accelerates licensing procedures, but whether the automatic issuance mechanism changes the juridical construction of the Positive Fictitious Decision from a legal fiction into an administrative act that produces a concrete licensing document.

This issue cannot be assessed solely in terms of normative consistency; rather, it must be examined through the lens of the Theory of Legal Certainty as an analytical framework. Gustav Radbruch identifies legal certainty as one of the three fundamental values of law, alongside justice and utility. In practice, these values often exist in an antinomic relationship, requiring the application of a principle of priority when conflicts arise (Margono, 2019). A more operational understanding of legal certainty is offered by Jan Michiel Otto through the concept of real legal certainty, which requires the cumulative fulfillment of five elements: the availability of clear, consistent, and accessible legal rules issued by or on behalf of the state; the consistent application of these rules by government institutions that are themselves bound by them; citizens' compliance with these rules; the consistent application of the rules by independent and impartial judges in resolving disputes; and the enforcement of judicial decisions (Bedner & Oomen, 2018). Otto's framework is relevant because it distinguishes formal, text-based legal certainty from legal certainty actually experienced by service recipients. It is therefore appropriate for examining whether the acceleration promised by the Online Single Submission Risk-Based Approach (OSS-RBA) genuinely delivers legal certainty or merely provides certainty regarding processing time. More specifically, the framework can be used to assess whether the regulatory basis of automatic licensing is sufficiently clear and consistent, whether it is implemented consistently by administrative institutions, and whether applicants retain adequate legal protection when disputes arise (Wicaksono et al., 2021; Irvansyah, 2022).

From a comparative perspective, this tension is not unique to Indonesia. The European Union introduced tacit authorization through Directive 2006/123/EC on services in the internal market as part of its agenda to simplify administrative licensing procedures. Article 13(4) recognizes the possibility of tacit authorization under certain conditions, while leaving room for exceptions were justified by overriding reasons relating to the public interest. In contrast, in the Netherlands, *lex silencio positive* applies only when expressly stipulated by law and is considered less compatible with the discretionary

authority of officials to conduct substantive assessments. Consequently, its application is carefully restricted and accompanied by various remedial mechanisms for affected parties (de Graaf et al., 2020). This comparison demonstrates that the application of automatic approval by legal fiction to licensing procedures involving extensive technical assessments inherently carries risks to substantive scrutiny and must therefore generally be balanced by adequate institutional safeguards. The comparative perspective is thus relevant not to equate the Indonesian and European models, but to identify the legal conditions necessary for an automatic approval mechanism to remain compatible with legal certainty and effective administrative protection.

Studies on Positive Fictitious Decisions in Indonesia have developed considerably; however, they have yet to address the issues examined in this research. Wicaksono et al. (2021) highlight the loss of authority of the State Administrative Court following regulatory restructuring under the Job Creation Law, while Aditya and Al-Fatih (2023) propose a redesign of legal remedies for Positive Fictitious Decisions following the enactment of the law. Spaltani (2024) proposes a reconceptualization of Positive Fictitious Decisions, while Efendi et al. (2026) examine the coexistence of negative and positive fictitious decision models within the Indonesian legal system. These studies remain primarily focused on statutory construction, judicial authority, remedies, and the conceptual classification of administrative silence. None, however, specifically examines Government Regulation Number 28 of 2025 as an implementing regulation that operationalizes the Positive Fictitious Decision mechanism through automatic electronic issuance within the OSS-RBA system. The research gap therefore lies not merely in the absence of a study concerning a newly enacted regulation, but in the absence of an analysis of whether the electronic issuance mechanism changes the juridical character of Positive Fictitious Decisions and whether such a change remains consistent with the requirements of legal certainty.

This study's novelty lies in two aspects. First, it positions Government Regulation Number 28 of 2025 as the object of analysis to examine the shift in the juridical construction of Positive Fictitious Decisions from a legal fiction into a mechanism capable of producing a definitive administrative licensing document. Second, it systematically evaluates this shift against the elements of the Theory of Legal Certainty, particularly the clarity and consistency of the legal framework, the consistency of administrative implementation, and the availability of effective legal protection. Through this approach, the study seeks to move beyond the question of whether Positive Fictitious Decisions are procedurally valid and instead examine whether the current OSS-RBA mechanism provides substantive and predictable legal certainty for business applicants.

Based on the foregoing discussion, this study formulates two research questions.

1. Does the Positive Fictitious Decision mechanism within the Online Single Submission Risk-Based Approach (OSS-RBA), as regulated under Government Regulation

Number 28 of 2025, remain consistent with the doctrinal essence of Positive Fictitious Decisions under the Government Administration Law?

2. What are the implications of this mechanism for legal certainty in business licensing when examined through the Theory of Legal Certainty?

This study aims to examine the changing juridical construction of Positive Fictitious Decisions in Risk-Based Business Licensing following the enactment of Government Regulation Number 28 of 2025. Furthermore, this study evaluates the implications of this regulatory transformation for legal certainty, particularly regarding regulatory consistency, administrative implementation, and the availability of effective legal protection for business applicants.

2. Research Methods

This study employs normative (doctrinal) legal research, which examines law as a set of norms, principles, and doctrines to address the legal issues under investigation (Marzuki, 2017). The object of this study is the vertical synchronization and the shift in the meaning of positive fictitious decision norms across various laws and regulations, from their initial design in 2014 to their operationalization in 2025. This study employs multiple approaches. The statutory approach examines Article 53 of the Government Administration Law, including its amendments through the Job Creation Law and its operationalization under Government Regulation Number 28 of 2025. The historical approach traces the genealogy of the relevant legal norms from their initial design in 2014 to their implementation in 2025. The conceptual approach explores the doctrines of lex silentio positiva, administrative discretion, and legal certainty. Finally, the comparative approach uses the experiences of the European Union and the Netherlands as analytical points of reference (Ibrahim, 2006).

The Theory of Legal Certainty is employed as the primary analytical framework to address the second research question. This theory is operationalized at two levels. The first level draws on Radbruch's conception of legal certainty as a fundamental value that may conflict with justice and utility, thereby situating policies aimed at accelerating licensing procedures within the context of competing legal values. The second level employs Otto's five elements of real legal certainty as more concrete assessment indicators. This approach ensures that the analysis goes beyond normative assertions and enables each element to be systematically examined in relation to the construction of positive fictitious decisions within the OSS-RBA.

The legal materials consist of primary legal sources, including Law Number 30 of 2014, Law Number 11 of 2020, Law Number 6 of 2023, Law Number 48 of 2009, Government Regulation Number 28 of 2025, Supreme Court Regulation Number 8 of 2017, Supreme Court Circular Letter Number 5 of 2021, and Directive 2006/123/EC. Secondary legal sources, comprising national and international books and academic journals, and

tertiary legal sources. The materials were collected through library research and analyzed using a qualitative-prescriptive method to formulate a normative assessment of their legal conformity and implications (Hadjon et al., 2005).

3. Result and Discussion

3.1. Conformity of the Positive Fictitious Decision Mechanism under PP No. 28 of 2025 with Its Doctrinal Essence

Article 53 of the Government Administration Law positions positive fictitious decisions as a corrective mechanism to the negative fictitious decision regime under the procedural law governing state administrative courts, which has traditionally interpreted administrative officials' silence as a rejection. Under the positive fictitious decision mechanism, silence extending beyond the prescribed time limit is instead deemed to constitute the legal approval of an application as stipulated in Article 53(3)-(4) of Law Number 30 of 2014 concerning Government Administration. This shift in interpretation is not merely a technical reversal but rather a redistribution of risk. Under the negative fictitious decision regime, the risk of bureaucratic delay is borne by the applicant, who must challenge a rejection that has never been expressly declared. Under the positive fictitious decision regime, this risk is transferred to the state as the party that has failed to fulfill its legal obligations.

What distinguishes the 2014 design is the existence of judicial safeguards. Applicants may submit an application to the State Administrative Court (*Pengadilan Tata Usaha Negara*/ PTUN) to obtain a judicial determination declaring their application granted, with the procedural rules governing this mechanism further established through Supreme Court Regulation No. 8 of 2017. This judicial determination is constitutive in nature because it transforms a legal status that was initially presumptive, that is, merely deemed to have been granted, into an actual State Administrative Decision (Keputusan Tata Usaha Negara) that can be executed. Without such a determination, the granting of the application remains merely a legal consequence arising from the administrative official's silence and has not yet materialized into an administrative document that the applicant can use.

The ratio legis of this regime is protective of citizens. Positive fictitious decisions (*fiktif positif*) are positioned as a legal remedy through which members of the public can challenge maladministration in the form of administrative delays or inaction, while also embodying the principles of legal certainty and good public service within the framework of the rule of law. The intended subjects are broadly defined, encompassing any member of the public who submits an application to a government agency or official, without restriction to any particular category of business actors. This broad scope is important to note, as it serves as one of the benchmarks for assessing the subsequent shift in the regime.

Within this doctrinal framework, judicial review is not merely an additional procedural requirement but rather a constitutive element of the very meaning of positive fictitious decisions. Such review ensures that the legal fiction established by statute can genuinely be enforced and does not remain merely a normative promise (Hoogstra, 2016; de Graaf et al., 2020). In European administrative law literature, tacit authorization is understood as a legal solution designed to encourage timely decision-making. However, its effectiveness depends significantly on the availability of mechanisms that enable applicants to demand the fulfillment of their rights when the administration remains inactive.

Accordingly, the doctrinal essence of positive fictitious decisions under the 2014 design can be formulated in four interrelated elements: the administrative official's failure to act within the prescribed time limit as the triggering legal event; the granting of the application as a presumptive legal consequence; the judicial determination as a constitutive instrument that concretizes that legal consequence; and the protection of citizens against maladministration as the ultimate objective. These four elements will serve as benchmarks for assessing whether the positive fictitious mechanism under the OSS-RBA remains within the same doctrinal framework.

Understanding this shift requires distinguishing between two dimensions of the legal construction of positive fictitious decisions. Under the 2014 Government Administration Law, positive fictitious decisions constituted a presumptive legal construct, whereby an administrative official's silence was merely deemed to constitute approval. However, this presumption did not automatically materialize into a concrete State Administrative Decision until a determination had been obtained from the State Administrative Court. Legal fiction and an actual administrative decision thus constituted two separate stages, connected by a judicial ruling. Recent studies have emphasized the need to reconceptualize Positive Fictitious Decisions following the enactment of the Job Creation Law, given that the original construct as a legal fiction has become increasingly difficult to sustain when its ultimate outcome is the issuance of an actual administrative decision.

The fundamental change was introduced through Article 175, point 6, of the Job Creation Law. The revised formulation of Article 53 reduces the time limit to five working days when the underlying legislation does not prescribe a specific period, while simultaneously removing the word “court,” thereby depriving the State Administrative Court of its authority to adjudicate applications for positive fictitious decisions. Consequently, the courts have declared themselves to lack jurisdiction, a position further reinforced by Supreme Court Circular Letter Number 5 of 2021. Recent studies have assessed this development as being in conflict with Article 53 paragraph (3) of the Government Administration Law and Article 10 of Law Number 48 of 2009 concerning Judicial Power, which prohibits courts from refusing to examine cases brought before them.

The consequence of this change is a paradoxical legal vacuum: the right to positive fictitious decisions remains recognized by statute, yet the mechanism for compelling its fulfillment has been closed off (Pengadilan Tata Usaha Negara Manado, 2025). This legal vacuum is further exacerbated by the failure to issue the Presidential Regulation mandated to replace the follow-up mechanism. In judicial practice, this situation has given rise to disparities in case handling, as reflected in the differing approaches adopted by courts when addressing applications for positive fictitious decisions that continue to be submitted by justice seekers.

A further issue concerns the legal basis for delegation. Article 53, as amended, mandates that follow-up arrangements be regulated through a Presidential Regulation. However, the instrument subsequently introduced to operationalize positive fictitious decisions is Government Regulation No. 28 of 2025. This discrepancy in the form of the legal instrument raises juridical questions regarding the validity of the delegation (lawful delegation) and the harmonization of the normative hierarchy, irrespective of the substantive matters regulated. Recent studies have even called for the restructuring or redesign of remedies for positive fictitious decisions following the enactment of the Job Creation Law, particularly with regard to the institution authorized to establish fictitious decisions and the use of information technology as a substitute for the lost adjudicative function.

Government Regulation No. 28 of 2025 subsequently establishes an entirely administrative control architecture. Positive fictitious decisions are tied to the Service Level Agreement (SLA), such that when the prescribed time limit expires, the Online Single Submission (OSS) system automatically issues the license. These provisions are set out in several articles, including Article 22 paragraph (3), concerning Land Spatial Utilization Conformity Approval (*Persetujuan Kesesuaian Kegiatan Pemanfaatan Ruang*/PKKPR Darat) without Technical Land Consideration, and Articles 225–230, concerning licensing for medium-high-risk and high-risk activities. Their implementation has been carried out in stages since 2 June 2025 across several sectors in Government Regulation No. 28 of 2025, Articles 22(3) and 225–230. Studies examining their implementation indicate that the codification of SLA requirements and the *FikPos* mechanism at critical stages of basic licensing significantly reduces the risks associated with time costs and bureaucratic coordination, while also serving as an instrument for attracting foreign direct investment (Yuliana, 2025; Kementerian Investasi dan Hilirisasi, 2026). As a substitute for judicial oversight, the Government Regulation relies on post-issuance supervision (post-audit), encompassing verification, evaluation, guidance, and license revocation, all of which are carried out after the license has been issued.

Assessing the conformity of the Positive Fictitious Decision mechanism requires distinguishing between its normative definition and substantive implementation. At the normative level, its fundamental principle remains unchanged: an administrative official's failure to issue a decision within the prescribed period is legally construed as

approval (*lex silencio positivo*). This principle has remained consistent from Law No. 30 of 2014 to Government Regulation No. 28 of 2025. Therefore, the change does not concern the formal definition of positive fictitious decisions, but rather their legal operation and institutional implementation (Utama, 2015; Simanjuntak, 2017; Norra, 2020). This distinction is important because the adoption of automatic licensing through OSS-RBA represents an institutional transformation rather than the abolition of the underlying legal fiction (Tekayadi et al., 2024; Hanum & Nadirah, 2026).

At the substantive level, however, the transformation is evident in four dimensions: the shift in *ratio legis* from protecting citizens against maladministration toward deregulation and investment acceleration; the narrowing of practical beneficiaries from the general public to business actors and investors; the replacement of judicial oversight with SLA-based administrative control and post-audit; and the transformation of a presumptive legal status into an actual administrative decision automatically issued through OSS-RBA. The fourth dimension is particularly significant because the issuance of a tangible licensing document weakens the conceptual basis of the term "fictitious," which originally referred to a legal presumption rather than an existing administrative instrument. Consequently, the terminology remains formally unchanged, while its substantive juridical construction has evolved (Spaltani, 2024).

This shift in the legal construct also intersects with the broader issue of administrative silence in Indonesia. Recent studies indicate that the negative fictitious model under the State Administrative Court Law and the positive fictitious model under the Government Administration Law now operate alongside one another without a clear hierarchy or priority of application. Consequently, administrative silence may be interpreted as either rejection or approval, depending on the legal regime being referred to. Such ambiguity reinforces the argument that the issue of positive fictitious decisions within OSS-RBA concerns not merely the model of control, but also its conceptual identity within Indonesia's administrative law system.

Thus, when assessed against the currently applicable version of the Government Administration Law following the enactment of the Job Creation Law and Law No. 6 of 2023, Government Regulation No. 28 of 2025 is relatively consistent, as it implements a regime that has already undergone deregulation. However, when assessed against the original essence of the 2014 design, the positive fictitious mechanism under OSS-RBA has deviated from its protective and judicial-oriented rationale, both in terms of its control model and its legal construct. This shift occurred through the Job Creation Law as an intervening variable, while Government Regulation No. 28 of 2025 serves as the downstream instrument that consolidates it.

3.2. Implications for Legal Certainty in Business Licensing from the Perspective of Legal Certainty Theory

To assess the implications of this shift, this study examines it through the lens of Legal Certainty Theory. Radbruch identifies legal certainty as one of the fundamental values of law, alongside justice and utility. In practice, these values often conflict, thereby necessitating a principle of prioritization. The positive fictitious decision policy under OSS-RBA explicitly prioritizes utility in the form of accelerated services and enhanced investment attractiveness. The problem, however, lies in justifying this utility by invoking legal certainty, even though the two represent distinct values. To evaluate this claim systematically, Otto's five elements of real legal certainty are employed as indicators.

The first element requires the availability of clear, consistent, and easily accessible legal rules. Article 53 of the Government Administration Law mandates that follow-up arrangements be established through a Presidential Regulation, which has never been issued, resulting in a prolonged legal vacuum. These arrangements were subsequently provided for through a Government Regulation, an instrument that differs from the form of regulation originally mandated. The inconsistency is further compounded by the implementation of Supreme Court Circular Letter Number 5 of 2021, which closes access to the courts even though the statutory provisions continue to recognize the relevant right, as well as by the coexistence of the negative fictitious and positive fictitious models without a clear priority of application. Consequently, applicants cannot determine with certainty which legal rules apply when an administrative official remains silent.

The second element requires government institutions to apply legal rules consistently and to abide by them. This element is only partially fulfilled. On the one hand, the OSS-RBA system automatically issues licenses when the SLA expires, thereby maintaining procedural consistency. On the other hand, issued licenses remain subject to evaluation, suspension, and even revocation if substantive non-compliance is subsequently identified, since positive fictitious decisions are defined as ensuring certainty regarding service time limits rather than guaranteeing the substantive correctness of the decision (Cahyandari, 2023). Consequently, the legality obtained by business actors carries inherent substantive uncertainty. Studies from a good governance perspective emphasize that the implementation of positive fictitious decisions must remain subject to the principles of good governance to ensure that administrative efficiency does not come at the expense of substantive accountability.

The fourth and fifth elements, namely the consistent application of legal rules by independent judges in dispute resolution and the enforcement of judicial decisions, are entirely unfulfilled. The removal of the State Administrative Court's authority through Article 175 point 6 of the Job Creation Law, as reinforced by Supreme Court Circular Letter No. 5 of 2021, eliminates the adjudicative forum for applicants whose rights to positive fictitious decisions have not been fulfilled. Under Otto's framework, these two

elements serve as the final links in the chain of legal certainty, because without them, legal norms remain mere declarations without enforceable force.

The results of this assessment indicate that, of the five elements of real legal certainty, the positive fictitious mechanism under OSS-RBA fulfills only the dimension of temporal predictability, which constitutes a small part of the second element, while the first, fourth, and fifth elements remain unfulfilled. Accordingly, the implications of this mechanism for legal certainty are paradoxical. What Government Regulation No. 28 of 2025 promises is more accurately described as procedural-temporal certainty, namely, certainty regarding when a license will be issued, rather than legal certainty in its theoretical sense, which encompasses clarity of legal norms, consistency in their application, and the availability of remedies for the protection of rights. Within Radbruch's framework, the value actually being maximized is utility, and this is achieved at the expense of legal certainty and the protection that constitutes the dimension of justice for applicants.

Comparative law confirms that this tension is not merely a local defect. In the Netherlands, *lex silencio positivo* applies only when expressly stipulated by law and is considered less compatible with the discretionary authority of administrative officials to conduct substantive assessments. Consequently, its application is carefully restricted and accompanied by remedial mechanisms for adversely affected third parties. This experience demonstrates that imposing a fiction of automatic approval on licensing processes involving extensive technical assessments risks compromising substantive scrutiny. In the Indonesian context, the absence of judicial oversight and equivalent remedial mechanisms shifts the burden of risk arising from substantive defects onto business actors as well as the public interest that such technical assessments are intended to protect. Genuine legal certainty requires a balance between speed and substantive safeguards, rather than sacrificing one for the other.

Against this background, legal certainty must also be considered from the perspective of business actors who rely on licensing documents issued through OSS-RBA. Automatic issuance may improve predictability in planning business activities, investment, and compliance schedules. However, such predictability is meaningful only when applicants can understand the legal scope, conditions, and continuing obligations attached to the license. A document generated after an SLA expires should not create an assumption that every substantive requirement has been conclusively satisfied. This distinction is important because risk-based licensing is designed to facilitate business activities while retaining regulatory control proportionate to the level of risk. Accordingly, certainty for businesses must encompass both license issuance and its subsequent legal consequences (Erni & Jaya, 2022; Asna & Sadiyah, 2025).

This distinction becomes particularly important because risk-based licensing does not eliminate the substantive standards applicable to business activities. The automatic issuance mechanism concerns the administrative consequence of an expired service

period, whereas the legality of business operations may still depend on technical requirements, standards, and sector-specific obligations. Business actors therefore need clear information about which requirements have been fulfilled at the time of issuance and which remain subject to subsequent verification. Without such differentiation, administrative acceleration may generate uncertainty over the extent of the rights obtained and the obligations that remain enforceable. The implementation of OSS should consequently be assessed not only by processing speed, but also by its capacity to communicate and maintain substantive licensing requirements (Nasution, 2022; Asna & Sadiyah, 2025).

Moreover, the transition between successive risk-based licensing regulations requires attention to regulatory continuity. Changes from the framework under Government Regulation No. 5 of 2021 to the arrangements under Government Regulation No. 28 of 2025 may affect how applicants understand licensing procedures, applicable requirements, and the legal effects of administrative silence. For legal certainty, the transition should be accompanied by clear guidance on the treatment of pending applications, previously issued licenses, and obligations that continue after the new system takes effect. Such clarity is necessary to prevent differences in administrative interpretation and ensure that business actors can adjust their conduct on a predictable legal basis. Recent analyses of the changing positive fictitious concept and risk-based licensing reform underline the importance of regulatory coherence in this process (Tekayadi et al., 2024; Pangestu & Sulaksono, 2026; Kartimin et al., 2026).

Finally, the legal certainty of automatic licensing should be measured by the availability of corrective protection when an issued license is later found to involve procedural or substantive defects. Such protection need not negate the objective of administrative efficiency; rather, it should clarify who may seek review, which authority is responsible, the applicable grounds and time limits, and the legal consequences of correction or revocation. A predictable remedial framework would also help distinguish the protection of applicants from the protection of third parties and public interests affected by licensed activities. This is particularly relevant given the debate over legal remedies and the position of positive fictitious decisions after the Job Creation Law. A coherent arrangement is therefore necessary to ensure that automatic issuance does not leave affected parties without effective legal recourse (Irvansyah, 2022; Zahro & Basri, 2023; Spaltani, 2024).

4. Conclusion

The positive fictitious mechanism under OSS-RBA retains the normative framework of *lex silencio positivo* but has shifted in essence in four respects: from an instrument for protecting citizens to an instrument of deregulation; from serving applicants among the general public to serving business actors and investors; from judicial oversight to administrative control; and from a presumptive legal construct to the concrete and automatic issuance of administrative decisions. The fourth shift deprives the term

"fictitious" of its conceptual foundation, as what occurs is no longer a legal presumption concerning something that does not exist, but rather the issuance of an actual State Administrative Decision based on the expiration of the service time limit.

Viewed through the lens of Legal Certainty Theory, the implications of this mechanism are inconsistent with the theory invoked to justify it. Of the five elements of real legal certainty, only the dimension of temporal predictability is fulfilled, while the elements concerning the clarity and consistency of legal rules, their application by independent judges, and the enforcement of judicial decisions remain unfulfilled. It is therefore recommended that the mechanism be restructured to restore the balance between accelerated services and substantive safeguards. This should be pursued through the issuance of an implementing regulation at the Presidential Regulation level, as mandated by Article 53, which establishes mechanisms for the restoration of rights; the restoration of access to an adjudicative forum for applicants whose rights have not been fulfilled; a clearer delineation of the scope of positive fictitious decisions in licensing processes involving extensive technical assessments; and a renewed conceptual examination of whether the term "positive fictitious decision" remains appropriate for decisions that are now issued concretely and automatically.

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