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Legal Protection for Directors of State-Owned Enterprises Against Corruption Criminal Liability in Corporate Action Decisions Under the Business Judgment Rule Principle

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Abstract

This study examines the adequacy of the Business Judgment Rule (BJR) as a legal protection mechanism for directors of State-Owned Enterprises (SOEs) against corruption criminal liability arising from corporate action decisions. The issue is significant because SOE directors in Indonesia often face criminal prosecution when high-value business decisions result in financial losses, particularly in transactions involving acquisitions, mergers, divestments, or restructuring. Although Law Number 1 of 2025 has formally codified the BJR through Article 9F, its effectiveness remains uncertain due to the continuing tension between corporate law, state finance doctrine, and anti-corruption enforcement. This research employs normative or doctrinal legal research by analysing statutes, court decisions, legal doctrines, and relevant scholarly literature. The study uses statutory, conceptual, and case approaches, supported by grammatical, systematic, and teleological interpretation. The findings show that Article 9F provides only qualified protection, not absolute immunity, because directors must prove the absence of fault or negligence, good faith and prudence, no conflict of interest, and efforts to prevent losses. However, the protection remains inadequate in practice. The provision still contains multi-interpretable terms, while the legal status of SOE assets and the public-law position of SOE directors remain contested, especially after the deletion of Article 9G by Law Number 16 of 2025. Law enforcement institutions also tend to begin from the premise of state financial loss rather than first assessing whether the decision satisfies the BJR threshold. Consequently, the BJR functions as preventive protection only de jure, but often becomes merely repressive protection in court proceedings. This study contributes to doctrinal scholarship by showing that codification alone cannot ensure legal certainty. It recommends binding judicial guidance and mandatory independent legal audits for corporate actions to operationalise the BJR as a predictable preventive safeguard.

Keywords: business judgment rule, corporate action, corruption, directors, state-owned enterprises.

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1. Introduction

One of the enduring challenges in corporate governance is determining the boundary between legitimate business risk and conduct that should attract legal liability (Pratama et al., 2025; Umar, 2026). Directors are expected to make strategic decisions under conditions of uncertainty, where even carefully considered choices may ultimately result in substantial financial losses. Modern corporate law therefore seeks to balance two competing objectives: ensuring accountability for misconduct while preserving managerial discretion necessary for business innovation and economic growth (Muhammad, 2025). The Business Judgment Rule (BJR) emerged as a legal doctrine designed to reconcile these objectives by protecting directors from liability for honest business decisions made in good faith and on an informed basis. However, the effectiveness of such protection becomes increasingly contested when corporate decisions intersect with public-law regimes, particularly anti-corruption law and state-finance regulation. It is within this unresolved intersection that the present study makes its contribution by examining whether the codified BJR under Law Number 1 of 2025 provides adequate legal protection for directors of Indonesian State-Owned Enterprises (SOEs) facing corruption criminal liability arising from corporate action decisions (Setiawati & Vitrana, 2025).

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The tension between protection of business discretion and demands for legal accountability is evident in a number of cases involving directors of State-Owned Enterprises (BUMN) in Indonesia. The prosecution of Karen Agustiawan, the former President Director of Pertamina, in connection with the liquefied natural gas procurement scheme, alongside the more recent conviction of the former directors of ASDP Indonesia Ferry over the acquisition of Jembatan Nusantara, demonstrates how corporate action decisions become focal points of criminal scrutiny (Tempo.co, 2025; Dandapala, 2025). These cases reveal a judiciary that struggles to maintain a consistent posture toward business discretion. In some instances, courts have embraced the protective logic of business judgment, while in others they have privileged the doctrine of state loss, producing an unpredictable jurisprudence that erodes the legal certainty directors require to function effectively.

It was against this backdrop that the legislature enacted Law Number 1 of 2025 on the Third Amendment to Law Number 19 of 2003 on State-Owned Enterprises, promulgated on 24 February 2025 (Fitriana et al., 2025). This statute marks the first formal codification of the Business Judgment Rule within the SOE legal framework through Article 9F, which shields directors from liability for losses provided they satisfy four cumulative conditions. The reform was explicitly designed as a legislative response to the criminalisation phenomenon, seeking to translate a doctrine previously inferred from Article 97 paragraph (5) of the Company Law into an express statutory safe harbour (Hukumonline, 2025). The codification accordingly represents a deliberate attempt to recalibrate the balance between protecting directorial professionalism and preserving the State's capacity to combat corruption within its corporate sector.

Yet the normative tension between these two objectives remains unresolved and arguably has been compounded rather than dissolved by subsequent legislative activity (UMBRA Strategic Legal Solutions, 2025). Law Number 16 of 2025, the Fourth Amendment, deleted Article 9G, which had previously declared that SOE directors, commissioners, and supervisory board members are not state administrators. The removal of that clarifying provision reintroduced uncertainty regarding the public-law status of SOE directors, leaving open the question of whether they remain subject to the jurisdiction of anti-corruption authorities. The interaction between the protective architecture of Article 9F and the renewed ambiguity surrounding directorial status therefore demands rigorous doctrinal examination, particularly in the high-stakes context of corporate action decisions.

A careful survey of the existing literature reveals a discernible gap that this article is positioned to address. Prior scholarship has tended either to treat the Business Judgment Rule generically, as it applies to ordinary operational decisions, or to examine the 2025 SOE Law in broad institutional terms (Fitriana et al., 2025). Several works analyse the dual nature of the BJR as both a shield for professional directors and a potential avenue for impunity, while others focus on the harmonisation of the SOE Law, the Anti-Corruption Law, and the State Finance Law (Pertanggungjawaban Pidana Direksi dan Komisaris BUMN, 2025). These contributions are valuable, yet they share a common limitation that defines the contours of the present inquiry and motivates its specific analytical focus.

The unresolved problem is the absence of a focused doctrinal assessment of whether the BJR norm in Law Number 1 of 2025 adequately protects directors against corruption liability arising specifically from corporate action decisions in SOE limited-liability companies. This gap matters because corporate actions possess a distinct risk profile. They involve transaction values that frequently reach trillions of rupiah, complex asset valuations, the participation of third parties, and inherent conflict-of-interest potential, all of which render them far more susceptible to classification as state-loss-generating conduct than routine operational decisions (Transparency International Indonesia, 2025). The doctrinal weakness lies in the indeterminacy of the statutory terms governing the safe harbour, which fail to supply law enforcement with operational criteria for distinguishing protected business judgment from culpable conduct.

This indeterminacy is not merely theoretical but produces concrete regulatory failure. Article 9F deploys evaluative phrases such as gross fault and conflict of interest without operational definition, while the broader statutory scheme leaves the relationship between separated state assets and state finances contested in light of established constitutional jurisprudence (Constitutional Court of the Republic of Indonesia, 2014). Consequently, the codified safe harbour risks remaining a paper guarantee, invoked in academic commentary yet inconsistently honoured in prosecutorial and judicial practice. The article argues that these specific doctrinal and regulatory deficiencies, rather than any general hostility toward business discretion, explain why the current framework cannot yet deliver the legal certainty that the reform promised.

Accordingly, the research problem may be formulated as follows: does the Business Judgment Rule principle in Law Number 1 of 2025 on State-Owned Enterprises provide adequate legal protection for directors of SOE limited-liability companies against the threat of corruption criminal liability arising from corporate action decisions alleged to cause state financial loss? The objective of this study is to analyse and explain the adequacy of the BJR in Law Number 1 of

2025 as a preventive legal protection instrument for SOE directors against corruption liability flowing from corporate action decisions, thereby clarifying the doctrinal and regulatory conditions under which such protection could become

2. Literature Review

2.1. The Concept and Doctrine of the Business Judgment Rule

The Business Judgment Rule originated in the common law systems of the United States and Australia as a judicial presumption that directors who act in good faith, on an informed basis, and without conflict of interest have discharged their duties properly (Visi Law Office, 2024). Assefa dan Adigeh (2026) its essence by describing the rule as one that immunises management from liability in corporate transactions undertaken within the corporation's power and management's authority, where a reasonable basis indicates the transaction was made with due care and in good faith. The doctrine thus functions as a safe harbour that discourages courts from substituting their own commercial judgment for that of directors. Its rationale is to encourage rational risk-taking, recognising that hindsight scrutiny of failed but honest decisions would paralyse entrepreneurial management.

Within Indonesian positive law, the doctrine was initially absorbed only implicitly through Article 97 paragraph (5) of Law Number 40 of 2007 on Limited Liability Companies, supported by Article 13 paragraph (2) of Financial Services Authority Regulation Number 33 of 2014 (Hukumonline, 2021). That provision relieved directors of personal liability for corporate losses where they could prove the absence of fault, the exercise of good faith and prudence, the lack of conflict of interest, and the adoption of preventive measures. The doctrine was subsequently reinforced in the SOE context by Government Regulation Number 23 of 2022, which extended comparable protection to SOE directors and commissioners (Widiarty et al., 2025). These instruments established a normative foundation, yet they left the doctrine vulnerable to displacement whenever prosecutors invoked the state-loss framework against SOE management.

The decisive transformation arrived with Article 9F of Law Number 1 of 2025, which codified the Business Judgment Rule explicitly and comprehensively for SOEs (Republic of Indonesia, 2025). The provision stipulates that a director cannot be held legally liable for losses if the director proves four cumulative requirements, namely that the loss was not caused by fault or negligence, that management was conducted in good faith and with prudence in accordance with the purpose of the SOE, that there was no direct or indirect conflict of interest, and that measures were taken to prevent the emergence or continuation of the loss (Hukumonline, 2025). This codification elevated the doctrine from an interpretive inference to an express statutory mandate, signalling the legislature's intention to furnish directors with a more robust and visible protective shield.

Despite this textual advance, a profound conceptual divergence persists between the Indonesian and American conceptions of the rule. In the United States, the presumption operates primarily within private law, channelling director liability toward civil remedies and shareholder actions (Pratama et al., 2025). In Indonesia, by contrast, the rule is frequently subordinated in corruption proceedings because of the dominance of the state-loss doctrine, under which SOE losses are readily equated with state financial losses. This subordination reflects the dual regime to which SOE directors are subject, and it explains why a doctrine designed to immunise honest commercial error has, in practice, often failed to prevent criminalisation. The transplantation of a common law presumption into a civil law anti-corruption environment therefore generates frictions that the mere act of codification cannot resolve.

A further conceptual point deserves emphasis because it conditions the entire analysis that follows. The Business Judgment Rule is not a licence for recklessness but a structured allocation of the burden of justification, demanding that the protected decision rest upon an adequate informational foundation gathered before the choice was made (Visi Law Office, 2024). Comparative doctrine treats the rule as procedural rather than substantive, meaning courts examine how a decision was reached rather than whether it ultimately succeeded. This procedural orientation is precisely what Indonesian practice has struggled to internalise, since enforcement officials tend to reason backward from a financial loss toward an inference of culpability. The doctrinal core of the rule therefore protects the integrity of the decision-making process, not the wisdom of the outcome, and that distinction frames every issue this article examines.

2.2. The Definition and Characteristics of Corporate Action in the SOE Context

Corporate action denotes a company decision that materially affects its capital structure, share ownership, or corporate existence (OCBC, 2023). In the Indonesian framework the principal categories include mergers, acquisitions, divestments, restructurings, and consolidations, several of which are defined within the Company Law (Republic of Indonesia, 2007). These transactions are distinguished from routine operational decisions by their strategic magnitude

and their capacity to reshape the fundamental architecture of the enterprise. Because they alter ownership and capital, they typically require the approval of the general meeting of shareholders and, in the SOE setting, the involvement of the relevant ministerial authority. Their procedural complexity and financial scale place them at the apex of directorial decision-making and, correspondingly, at the centre of legal risk.

In the SOE context these characteristics acquire heightened legal significance because corporate actions engage separated state assets and intersect directly with contested notions of state finance (UMBRA Strategic Legal Solutions, 2025). An SOE merger or acquisition does not merely reorganise private capital; it deploys assets that originated from state equity participation, thereby attracting the attention of auditing and law enforcement institutions. The requirement of shareholder and ministerial approval, while intended to ensure accountability, simultaneously multiplies the layers of decision-making whose adequacy may later be questioned. Consequently, the same procedural safeguards that legitimise a corporate action can become evidentiary battlegrounds when prosecutors seek to demonstrate that the decision was insufficiently informed or improperly motivated.

The distinctive legal risk of corporate actions lies precisely in their value and complexity. Decisions worth trillions of rupiah become acutely vulnerable to classification as conduct that harms state finances, particularly when the valuation of acquired assets is contested or when anticipated synergies fail to materialise (Transparency International Indonesia, 2025). The acquisition of Jembatan Nusantara by ASDP, valued in the trillions and ultimately prosecuted as corruption, exemplifies how a strategic transaction can be recharacterised as a criminal act notwithstanding the directors' invocation of business judgment (Kompas.com, 2025). This vulnerability distinguishes corporate actions from ordinary operational choices and justifies the article's narrow analytical focus, since the adequacy of the BJR must be tested against the most demanding category of decisions it purports to protect.

2.3. Criminal Liability of Directors in Corruption Offences

The criminal liability of SOE directors for corruption is governed by Articles 2 and 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001, which require the elements of unlawfulness, enrichment of oneself, another person, or a corporation, and the causation of state financial loss (Visi Law Office, 2024). The interpretation of state financial loss was significantly altered by Constitutional Court Decision Number 25/PUU-XIV/2016, which removed the word can from the relevant provisions, thereby transforming the loss element from a potential loss into an actual loss that must be concretely proven. This shift theoretically narrowed the scope of criminalisation, yet in practice prosecutors have continued to treat SOE losses as presumptive indicators of state loss, perpetuating the conflation that the Business Judgment Rule was meant to dissolve.

Central to the validity of any business judgment defence is the doctrine of mens rea, the guilty mind that distinguishes culpable wrongdoing from honest commercial error. Scholars and practitioners concur that, absent proven mens rea, a risky business decision cannot automatically be qualified as a corruption offence (Hukumonline, 2023). The Latin maxim actus non facit reum nisi mens sit rea encapsulates this principle, requiring both a prohibited external act and a blameworthy internal disposition before criminal liability attaches. In the corporate context, this means that a director who acts within authority, on an informed basis, and without fraudulent intent should fall outside the reach of the penal law, regardless of the financial outcome of the decision. The Business Judgment Rule operates as the normative mechanism that separates ordinary business risk from unlawful conduct.

The enactment of Law Number 1 of 2025 ostensibly inaugurated a paradigm shift in this analysis. Under the new framework, investigators are expected to first determine whether a director's decision satisfies the BJR requirements before advancing a criminal process, thereby positioning the rule as a threshold filter rather than a mere defence raised at trial (Antara, 2026). This sequencing, if honoured, would relocate the protective effect of the doctrine to the earliest stage of law enforcement, preventing the reputational and personal harm that accompanies investigation and prosecution. Nevertheless, the absence of binding procedural guidance means that this paradigm shift remains aspirational, dependent on the willingness and capacity of investigators to internalise commercial logic into their evaluative practice.

A comparative observation reinforces the diagnosis advanced throughout this study. In jurisdictions where the Business Judgment Rule is mature, the threshold inquiry into good faith and informed decision-making is conducted before liability is even contemplated, and only a minority of contested director decisions ever cross into the criminal sphere (Hukumonline, 2023). Indonesian practice inverts this sequence by allowing the quantum of loss to drive the characterisation of conduct, so that the larger the loss the stronger the gravitational pull toward a corruption charge. This inversion is doctrinally significant because it converts an outcome-based metric into a proxy for criminal intent,

displacing the mens rea inquiry that ought to govern. The persistence of this pattern despite successive legislative reforms suggests that the obstacle is interpretive culture rather than statutory text alone.

2.4. The Theory of Legal Certainty and the Theory of Legal Protection

The grand theory underpinning this analysis is Gustav Radbruch's conception of the three basic values of law, namely justice, expediency, and legal certainty (Firdaus, 2025). Radbruch maintained that a sound legal order must reconcile these values, while recognising that they exist in a perpetual relationship of tension, a Spannungsverhältnis in which the enhancement of one may diminish another. Legal certainty, in particular, demands that norms be clear, non-contradictory, and capable of consistent and predictable application. A norm riddled with multi-interpretable terms fails this standard because it cannot reliably guide conduct or constrain official discretion. This framework supplies the analytical lens through which the determinacy of Article 9F may be assessed.

The middle theory is Philipus M. Hadjon's theory of legal protection, which distinguishes preventive protection from repressive protection (Hadjon, 1987). Preventive protection seeks to forestall violations before they occur, principally through clear legislation that channels official conduct, whereas repressive protection resolves disputes after a violation has materialised, typically through judicial proceedings (Hukumonline, 2022). Hadjon conceived legal protection as the safeguarding of dignity and recognised rights against arbitrary power, a conception directly relevant to directors confronting the coercive machinery of corruption enforcement. The classification permits a precise inquiry into whether the codified BJR functions as a genuine preventive shield or merely as a defensive argument deployed at trial.

Synthesising these theories yields the article's applied analytical posture. A codified Business Judgment Rule should, in principle, operate as a preventive legal protection instrument, a statutory safe harbour that immunises qualifying directors from criminalisation at the investigative stage itself (Widiarty et al., 2025). Measured against Radbruch's standard, however, the preventive promise of Article 9F is contingent upon the determinacy of its terms, for a norm that cannot be predictably applied cannot deliver certainty. Measured against Hadjon's typology, the provision's effectiveness depends on whether law enforcement institutions actually treat it as a threshold filter or relegate it to the courtroom. These theoretical commitments structure the discussion that follows and supply the criteria against which the adequacy of the reform is ultimately judged.

3. Methods

This study constitutes normative or doctrinal legal research, which examines law as a system of norms, the realm of das sollen, rather than as a pattern of social behaviour, the realm of das sein (Marzuki, 2021). Doctrinal research is appropriate here because the research problem concerns the internal coherence and adequacy of legal norms, specifically whether the codified Business Judgment Rule supplies a determinate and predictable standard of protection. Although the challenges surrounding the implementation of the BJR often appear as policy and enforcement problems, this study proceeds from the premise that many of those difficulties originate from unresolved normative questions, including ambiguities in statutory language, competing interpretations of state financial loss, and the absence of operational legal standards for assessing good faith, prudence, and conflict of interest. Accordingly, the objective of this research is not to evaluate the empirical performance of law enforcement institutions, but to identify doctrinal inconsistencies and regulatory gaps that contribute to implementation problems in practice.

The study integrates three complementary approaches. The statute approach scrutinises Law Number 1 of 2025 on SOEs, particularly Articles 9F and 4B, alongside Law Number 16 of 2025, Article 97 paragraph (5) of Law Number 40 of 2007 on Limited Liability Companies, and Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 on Corruption Eradication (Hidayat et al., 2020; Irriansyah et al., 2021; Republic of Indonesia 2025; Zulyadi, 2020). The conceptual approach analyses the doctrine of business judgment, the concept of corporate action, and the elements of criminal liability including mens rea, actus reus, and fiduciary duty (Hukumonline, 2023). The case approach examines relevant judicial decisions, principally Supreme Court Decision Number 121 K/Pid.Sus/2020, together with recent corruption rulings involving SOE directors, in order to test doctrine against adjudicative practice. (Mahkamah Agung Republik Indonesia, 2020). These cases were selected purposively because they represent two contrasting judicial approaches to the application of the Business Judgment Rule in corruption cases involving SOE directors. Both cases involve high-value corporate decisions, allegations of state financial loss, and criminal proceedings against SOE directors arising from corporate action decisions. However, they produced different legal outcomes and judicial reasoning. The comparison of these two cases therefore provides a suitable analytical basis for evaluating the consistency and effectiveness of the Business Judgment Rule as a legal protection mechanism for SOE directors.

The legal materials are organised into three tiers in accordance with established doctrinal methodology. Primary legal materials comprise the relevant statutes arranged by hierarchy, namely the Corruption Eradication Law, the Company Law, and the SOE Law, together with binding judicial and constitutional decisions (Marzuki, 2021). Secondary legal materials encompass scholarly journals, legal monographs, and authoritative doctrine that interpret and contextualise the primary materials. Tertiary legal materials include legal dictionaries and encyclopaedias that clarify terminology. This tiered structure ensures that the analysis rests on authoritative foundations and that interpretive conclusions are anchored in sources whose validity can be traced and verified, consistent with the rigour expected of doctrinal scholarship.

Legal materials were gathered through documentary and library research, encompassing statutory texts, court decisions, and peer-reviewed literature. The collected materials were analysed qualitatively through three modes of legal interpretation that operate in concert (Marzuki, 2021). Grammatical interpretation clarifies the ordinary meaning of statutory terms, systematic interpretation situates each provision within the broader legal order, and teleological interpretation discerns the purpose the legislature sought to achieve. Conclusions were drawn through deductive reasoning, proceeding from general norms and doctrines to their application in the specific context of SOE corporate actions. This methodological combination enables the study to evaluate not only what the BJR provisions say, but whether they cohere and whether they can be predictably applied.

4. Result and Discussion

4.1. The BJR Norm in Law Number 1 of 2025: Construction and the Qualified Nature of Its Protection

A textual analysis of Article 9F of Law Number 1 of 2025 reveals that the provision constructs a regime of qualified immunity rather than absolute immunity. The norm does not declare directors categorically immune; instead, it relieves them of liability only upon proof of four cumulative conditions (Republic of Indonesia, 2025). This construction embeds a reversed burden of proof, requiring the director to demonstrate compliance rather than obliging the accuser to establish culpability. The architecture therefore protects only the diligent and honest director, leaving the negligent or self-dealing director fully exposed. By conditioning protection upon affirmative proof, the legislature signalled that the safe harbour is a reward for compliant conduct, not a blanket shield, a design that aligns conceptually with the protective rationale of the common law doctrine while adapting it to the Indonesian evidentiary tradition.

The four cumulative requirements carry significant juridical implications for directors undertaking corporate actions. A director contemplating a merger or acquisition must be able to prove that the resulting loss was not attributable to fault or negligence, that the transaction was pursued in good faith and with prudence consistent with the SOE's purpose, that no conflict of interest tainted the decision, and that mitigation steps were taken once risk materialised (Hukumonline, 2025). Because these conditions are cumulative, the failure of any single element forfeits the entire protection. For corporate actions, whose execution typically spans extensive due diligence, valuation, and multi-organ approval, the cumulative structure demands a meticulously documented decision-making trail. The evidentiary burden thus transforms procedural diligence into the practical precondition of legal safety.

A comparison with Article 97 paragraph (5) of the Company Law shows both continuity and refinement. The SOE provision reproduces the substance of the company-law formulation yet renders it more specific by situating it within the SOE governance framework and by linking it to the enterprise's statutory purpose (Sutanto, 2025). Despite this refinement, the provision continues to deploy evaluative terms whose meaning remains operationally undefined. The phrases' gross fault and conflict of interest, in particular, are left without precise statutory criteria, preserving a grey area that invites divergent interpretation (Fitriana et al., 2025). This indeterminacy is consequential because the same conduct may be characterised by one official as protected prudence and by another as culpable negligence, depending on subjective appraisal rather than ascertainable standards.

The interpretive instability is aggravated by the structural ambivalence introduced through the deletion of Article 9G by Law Number 16 of 2025. The deleted provision had declared that SOE directors, commissioners, and supervisory board members are not state administrators, a clarification that situated them outside the jurisdiction premised on that status (UMBRA Strategic Legal Solutions, 2025). From a political economy perspective, the elimination of Article 9G reflects a tension between two divergent policy objectives in the management of state-owned enterprises. On the one hand, the reform of state-owned enterprises through Law Number 1 of 2025 aims to strengthen the business orientation of state-owned enterprises by providing greater legal certainty for directors and reducing concerns about criminalization of business decisions made in good faith. This objective is reflected in the regulation that emphasizes that directors,

commissioners, and supervisory boards of state-owned enterprises are not categorized as state administrators. However, on the other hand, concerns have arisen that this regulation has the potential to narrow the scope of supervision and law enforcement for corruption crimes in the management of state-owned assets. In this context, the elimination of Article 9G through Law Number 16 of 2025 can be understood as a form of legislative policy adjustment that seeks to maintain the authority of supervisory and law enforcement agencies in overseeing the corporate activities of state-owned enterprises. Thus, the elimination of Article 9G is not merely a technical change in the formulation of the norm, but rather reflects the unresolved policy debate regarding the position of state-owned enterprise directors: whether they should be viewed primarily as corporate managers pursuing commercial objectives or as bearers of a public trust subject to the state's financial accountability regime. The legislative oscillation between asserting and retracting this status epitomises the broader incoherence of the reform, since a director's exposure to corruption enforcement now depends on an unsettled classificatory premise rather than on the merits of the business decision itself.

When these textual features are assessed together, the protective architecture of Article 9F emerges as internally sound yet externally fragile. The provision coherently distinguishes the diligent director from the culpable one, and its cumulative conditions articulate a defensible standard of conduct (Widiarty et al., 2025). The fragility lies not in the conception of the safe harbour but in the indeterminacy of its operative terms and in the unsettled status of its beneficiaries. A safe harbour whose boundaries cannot be reliably charted offers limited reassurance to those it purports to protect. The analysis therefore confirms that codification, while necessary, is insufficient on its own to convert the doctrine into a dependable instrument of protection for high-value corporate action decisions.

It is instructive to read Article 9F alongside Article 4B of the same statute, since the two provisions were intended to operate in tandem. Article 4B characterises the gains and losses of an SOE as belonging to the enterprise rather than to state finances, a premise that, if accepted, would deprive the state-loss element of its foundation in many corporate-action prosecutions (Widiarty et al., 2025). Yet the legislature did not reconcile this characterisation with the constitutional jurisprudence that treats separated state assets as part of state finance, leaving two authoritative premises in open conflict. The result is that the safe harbour of Article 9F rests upon an asset-status foundation that remains legally contested, so that a director who satisfies every behavioural requirement may still be exposed if a court adopts the constitutional rather than the statutory premise of loss.

4.2. SOE Corporate Action as a Locus of Criminalisation Risk and the Relevance of the BJR

Corporate actions constitute a locus of acute criminalisation risk because they concentrate the very features that prosecutors scrutinise most intensely. Their transaction values are large, their asset valuations are technically complex, they frequently involve third parties whose interests may diverge from the enterprise, and they harbour an inherent potential for conflict of interest (Transparency International Indonesia, 2025). Each of these features supplies a plausible entry point for an allegation that the decision was insufficiently informed, improperly motivated, or detrimental to state finances. Because the financial magnitude of a corporate action amplifies any resulting loss, the temptation to recharacterise a failed transaction as a corruption offence is correspondingly strong, rendering corporate actions the sharpest test of the BJR's protective capacity.

The ASDP acquisition case vividly demonstrates this dynamic. In November 2025 the Jakarta Corruption Court convicted three former ASDP directors, including President Director Ira Puspadewi, sentencing her to four years and six months of imprisonment in connection with the acquisition of Jembatan Nusantara, which prosecutors valued at a state loss exceeding one trillion rupiah (Dandapala, 2025). The majority of the panel held that the Business Judgment Rule was inapplicable because the requirements of good faith and prudence were, in their view, unmet. The conviction illustrates how a strategic transaction can be criminalised notwithstanding a documented business rationale, exposing the precariousness of directorial protection when the determinacy of the safe harbour's terms is left to subjective judicial appraisal.

What renders the ASDP case especially instructive is the dissenting opinion of the presiding judge, Sunoto, who would have acquitted the defendants through an ontslag van alle rechtsvervolging. The dissent reasoned that the acquisition was a business decision protected by the Business Judgment Rule, evidenced by a comprehensive due diligence exercise costing some eleven billion rupiah and conducted by seven professional consultants, by layered approvals from the commissioners, the general meeting of shareholders, and the Minister of SOEs, by the absence of conflict of interest, and by positive commercial results including substantial revenue contribution and market-share growth (Dandapala, 2025; Hukumonline, 2025). The divergence between the majority and the dissent within a single panel demonstrates that the inconsistency in applying the BJR is not merely inter-court but intra-court, confirming the doctrinal indeterminacy diagnosed above.

The contrast with Supreme Court Decision Number 121 K/Pid.Sus/2020 sharpens the point. In Decision Number 121 K/Pid.Sus/2020, the Supreme Court focused primarily on the integrity of the decision-making process. The Court examined whether the director acted within corporate authority, relied on adequate information, obtained the necessary approvals, and acted without fraud, conflict of interest, or personal benefit. The existence of a financial loss was not treated as sufficient evidence of criminal liability. Instead, the Court adopted an ex ante perspective by evaluating the reasonableness of the decision at the time it was made. By contrast, in the ASDP case, the majority judgment placed greater emphasis on the outcome of the transaction and the magnitude of the alleged state loss. Although extensive due diligence, professional valuation, and multi-layered corporate approvals had been conducted, these procedural safeguards were considered insufficient to satisfy the requirements of good faith and prudence. Consequently, while the Pertamina decision treated the Business Judgment Rule as a threshold doctrine that filters criminal liability through an assessment of the decision-making process, the ASDP majority approached the doctrine more narrowly by allowing the resulting loss to play a dominant role in determining criminal responsibility. This divergence demonstrates that the core inconsistency lies not in the statutory formulation of the Business Judgment Rule itself, but in the judicial methodology used to assess corporate decision-making. The comparison can be seen briefly in table 1.

Table 1. Comparison of the Ratio Decidendi between Supreme Court Decision No. 121 K/Pid.Sus/2020 and the ASDP Acquisition Case

Aspect	Supreme Court Decision No. 121 K/Pid.Sus/2020 (Pertamina Case)	ASDP Acquisition Case (2025)
Primary Judicial Focus	Integrity of the decision-making process	Outcome of the transaction and alleged state loss
Judicial Approach	Ex ante assessment based on information available when the decision was made	Ex post assessment emphasizing the consequences of the decision
Treatment of Business Judgment Rule	Applied as a threshold doctrine to distinguish business risk from criminal conduct	Applied restrictively and subordinated to state-loss considerations
Evaluation of Due Diligence	Due diligence and corporate procedures were considered evidence of good faith and prudence	Due diligence and corporate approvals were considered insufficient to establish good faith and prudence
Role of State Financial Loss	Financial loss alone was not considered sufficient to establish criminal liability	Alleged state loss became a dominant factor in determining liability
Conflict of Interest Assessment	Absence of fraud, personal benefit, and conflict of interest supported legal protection	Absence of conflict of interest did not prevent criminal liability
Legal Outcome	Defendant released from criminal liability (onslag van alle rechtsvervolging)	Directors convicted of corruption offences
Underlying Ratio Decidendi	Emphasis on the legality and reasonableness of the decision-making process	Emphasis on the consequences of the transaction and resulting losses
Implication for BJR Doctrine	Strengthened the protective function of the Business Judgment Rule	Limited the practical effectiveness of the Business Judgment Rule

The dualism is compounded by the trajectory of the same Pertamina director in a separate matter. While the BMG block investment yielded protection under the 2020 decision, the liquefied natural gas procurement scheme produced a conviction, with the sentence escalating from nine years at first instance in 2024 to thirteen years on cassation in 2025 (Tempo.co, 2025). That a single individual can be shielded by the Business Judgment Rule in one transaction yet convicted of corruption in another underscores that the decisive variable is not the identity of the director but the judiciary's fluctuating willingness to honour business judgment. This fluctuation confirms that the relevance of the BJR to corporate actions is genuine in principle yet unreliable in practice, precisely the deficiency this article seeks to expose.

On a doctrinal plane, the relevance of the Business Judgment Rule to corporate actions is firmly established. Decisions to merge, acquire, or divest are paradigmatic business decisions, undertaken within the corporation's purpose and the directors' authority, and they ordinarily proceed through due diligence and competent organ approval (Antikorupsi.org, 2023). Provided these decisions are grounded in adequate information and free of fraudulent intent, they satisfy the conceptual core that the doctrine protects. The difficulty is not that corporate actions fall outside the BJR's protective rationale, but that the indeterminate statutory terms and the contested asset-status question allow that rationale to be overridden whenever a substantial loss invites the state-loss characterisation.

The juxtaposition of these cases yields a typology that clarifies when the doctrine succeeds and when it fails. Protection tended to prevail where the court accepted the separation of corporate from state assets and confined its inquiry to the integrity of the decision-making process, as in the Pertamina cassation that released the director from prosecution (Antikorupsi.org, 2023). Conviction tended to follow where the court foregrounded the magnitude of the loss and treated procedural diligence as insufficient to displace the inference of culpability, as the ASDP majority did. The decisive variable across these outcomes is not the quality of the directors' conduct, which was extensively documented in both instances, but the interpretive frame the court selected at the outset. That the frame remains a matter of judicial choice rather than legal command is the clearest evidence of the certainty deficit this article identifies.

4.3. Assessing the Adequacy of the BJR as a Preventive Legal Protection Instrument

Viewed through Radbruch's theory of legal certainty, the codified Business Judgment Rule has not yet achieved its protective potential. Although the doctrine has been positivised in Article 9F, the norm continues to harbour evaluative expressions that remain multi-interpretable, rendering its application difficult to predict (Firdaus, 2025). Radbruch's insistence that legal certainty requires clear and non-contradictory norms exposes the provision's central weakness, for a safe harbour defined by undefined terms cannot reliably guide either directors or enforcers. The tension Radbruch identified between certainty and justice manifests acutely here, since the pursuit of case-by-case justice through subjective appraisal of good faith generates precisely the unpredictability that erodes certainty for the entire class of SOE directors. (Horn et al., 2024)

Examined through Hadjon's theory of legal protection, Article 9F satisfies the formal criteria of preventive protection while faltering at the implementational level. Normatively, the provision aspires to prevent criminalisation from the investigative stage by establishing a threshold the satisfaction of which forecloses liability (Hukumonline, 2022). In practice, however, its preventive operation depends on the capacity of law enforcement officials to comprehend commercial logic and to apply the threshold before initiating a criminal process. Where investigators proceed instead from the premise of state loss, the preventive shield collapses into a mere defensive argument raised belatedly at trial. The provision therefore delivers preventive protection de jure but, in the absence of enabling institutional practice, only repressive protection de facto. (Mardiana et al., 2025).

The gap between norm and practice is most visible in the conduct of enforcement institutions. Anti-corruption authorities and prosecutors frequently commence investigations from the standpoint of state financial loss, treating the existence of a loss as the starting point of inquiry rather than first assessing whether the BJR requirements are satisfied (Widiarty et al., 2025). This sequencing inverts the paradigm shift that Law Number 1 of 2025 ostensibly mandated, relegating the safe harbour to an afterthought. The persistence of this practice reflects an entrenched interpretive culture in which the financial outcome of a decision, rather than the process by which it was reached, drives the criminal characterisation, thereby neutralising the preventive ambition of the codified rule.

Several interlocking factors weaken the effectiveness of the BJR as a preventive protection instrument, and the first is the absence of standardised operational guidance for officials tasked with evaluating compliance with the rule's requirements. Without a binding protocol specifying how good faith, prudence, and conflict of interest are to be assessed, each investigator and judge applies an idiosyncratic standard (Dandapala, 2025). This explains the intra-panel divergence observed in the ASDP case, where members of the same court reached opposite conclusions on identical facts. The lack of a shared evaluative framework converts the safe harbour into a lottery, in which protection depends on the interpretive disposition of the particular official rather than on ascertainable legal criteria, a condition fundamentally incompatible with legal certainty.

A second weakening factor is the unresolved ambiguity concerning the status of SOE assets following the legislative amendments. Article 4B of Law Number 1 of 2025 sought to characterise SOE gains and losses as belonging to the SOE rather than to state finances, yet this characterisation sits uneasily with Constitutional Court Decisions Number 48 and 62/PUU-XI/2013, which affirmed that separated state assets remain within the state-finance regime (Constitutional Court of the Republic of Indonesia, 2014). The deletion of Article 9G by Law Number 16 of 2025 further muddied the directors' public-law status. This unsettled doctrinal terrain allows prosecutors to anchor the state-loss characterisation in constitutional jurisprudence while directors invoke the statutory separation, producing a normative stalemate that the BJR alone cannot break.

A third factor is the limited fluency of law enforcement officials in the logic and instruments of corporate business (Alfiansyah et al., 2025). Evaluating whether a corporate action was prudent requires familiarity with due diligence methodologies, valuation techniques, and the inherent uncertainty of strategic investment, competencies that lie outside

the traditional training of criminal investigators. When officials lack this fluency, they are prone to equate a poor commercial outcome with culpable conduct, mistaking the materialisation of ordinary business risk for evidence of wrongdoing. This competence deficit reinforces the tendency to privilege the state-loss framework, because a loss is easier to perceive than the reasonableness of the process that produced it, thereby systematically disadvantaging the very directors the BJR was designed to protect.

The convergence of these factors compels the conclusion that the BJR, as presently constructed, supplies inadequate preventive protection for corporate action decisions. The doctrine is conceptually apt and normatively codified, yet it is operationally adrift, lacking the determinate criteria, the settled asset-status premise, and the institutional competence necessary to function as a genuine safe harbour (Pertanggungjawaban Pidana Direksi dan Komisaris BUMN, 2025). The reform has succeeded in declaring the principle but has failed to render it enforceable in the manner that high-value corporate actions require. This diagnosis directly answers the research problem by demonstrating that the protection afforded is real on paper yet contingent and unreliable in the prosecutorial and judicial practice that ultimately determines a director's fate.

A final dimension of inadequacy concerns the temporal mismatch between the moment of decision and the moment of judgment. A corporate action is decided under conditions of genuine uncertainty, where outcomes cannot be known and where reasonable directors may differ, yet it is later judged with the full benefit of hindsight after the loss has crystallised (Pertanggungjawaban Pidana Direksi dan Komisaris BUMN, 2025). Hindsight bias systematically inclines the evaluator to perceive a bad outcome as foreseeable and therefore avoidable, distorting the assessment of good faith and prudence that Article 9F requires. The Business Judgment Rule was conceived precisely to neutralise this bias by anchoring the inquiry at the time of decision, but without operational instructions directing officials to adopt that ex ante perspective, the codified rule cannot discipline the retrospective reasoning that drives criminalisation of high-value transactions.

The cumulative diagnosis carries a clear normative implication for the design of any effective safe harbour. Legal certainty in this domain cannot be achieved by declaratory legislation alone, because the decisive interpretive choices are made downstream by investigators, prosecutors, and judges who require concrete criteria to apply the rule consistently (Sutanto, 2025). The reform of 2025 supplied the principle but withheld the apparatus needed to operationalise it, leaving a gap between legislative intention and enforcement reality. Closing that gap demands instruments that translate the abstract requirements of good faith and prudence into verifiable indicators, generated at the decision-making stage and binding upon those who later sit in judgment. Only then can the preventive ambition of the doctrine be realised in the practice that ultimately determines directors' fate.

To convert the BJR into an adequate preventive instrument, two doctrinal reforms are warranted. First, the Supreme Court should issue a regulation or circular establishing binding guidance for judges on how to assess satisfaction of the BJR requirements in corruption cases involving SOE directors, thereby supplying the determinate criteria that the statute omits (Sutanto, 2025). Second, an independent legal audit conducted by qualified legal auditors should be made a mandatory precondition for corporate actions, generating a documented record of due diligence that operationalises the good-faith and prudence requirements in advance (“Rekonstruksi Politik Hukum Pidana tentang Legal Audit,” n.d.). These measures would relocate the protective effect of the doctrine to the decision-making and investigative stages, aligning practice with the preventive ambition of Article 9F and restoring the legal certainty that the reform promised but has not yet secured.

5. Conclusion

This study concludes that the Business Judgment Rule codified in Article 9F of Law Number 1 of 2025 has not yet provided adequate legal protection for directors of State-Owned Enterprise limited-liability companies against corruption criminal liability arising from corporate action decisions. Although the provision formally establishes preventive legal protection, its practical effectiveness remains limited because its evaluative requirements, such as good faith, prudence, negligence, and conflict of interest, are still open to multiple interpretations. The protection also becomes uncertain due to the unresolved relationship between SOE assets and state finances, as well as the continuing tendency of law enforcement institutions to assess corporate losses through the state-loss framework rather than through the business-judgment threshold. As a result, the BJR still operates more as a repressive defence in court than as a genuine preventive shield at the investigative stage.

The limitation of this study lies in its normative and doctrinal character. The analysis focuses on statutory provisions, legal doctrines, court decisions, and secondary legal materials, without conducting empirical investigation into the

actual perspectives of investigators, prosecutors, judges, SOE directors, or legal auditors. Therefore, this study does not measure how consistently the BJR is applied in daily enforcement practice or how directors perceive its protective function in real corporate decision-making. In addition, the study focuses specifically on corporate action decisions within SOE limited-liability companies, so its findings may not fully represent other types of SOEs, ordinary operational decisions, or private corporations.

Future research should move beyond general empirical assessments and focus on developing concrete regulatory and institutional mechanisms capable of operationalising the Business Judgment Rule in corruption cases involving SOE directors. Future studies should prioritise the design of a judicial guideline framework that could be adopted by the Supreme Court of Indonesia, including objective indicators for assessing good faith, prudence, conflict of interest, due diligence, and loss-prevention efforts in corporate action decisions. Further research may also formulate a draft Supreme Court Regulation (Peraturan Mahkamah Agung) or Supreme Court Circular Letter (Surat Edaran Mahkamah Agung) that standardises the application of the Business Judgment Rule across judicial proceedings. In addition, future studies should develop a model of mandatory independent legal audits for high-value corporate actions, specifying the qualifications of legal auditors, the scope of review, evidentiary standards, and the legal consequences of audit findings during criminal investigations and court proceedings.

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