

# Al-Hisbah Contextualization In The Business Competition Law In Indonesia

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## ***Al-Hisbah* Contextualization In The Business Competition Law In Indonesia**

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**Abstract:** *Al-Hisbah Contextualization In The Business Competition Law In Indonesia.* Supervision of market activities and competition in Islam has existed since the time of Prophet Muhammad PBUH and, at the same time, became a duty of an official called a *muhtasib* (supervisor). *Al-Hisbah*, as a controller institution for economic activities and market competition, aims to uphold the *amar ma'ruf nahi munkar* (commanding the good and forbidding the evil). Meanwhile, KPPU is an independent institution, functions as a controller of the practice of monopolies and unfair business competition in Indonesia under the principle of economic democracy to support national economic development. This research uses the juridical-normative method with a historical and conceptual approach. Having compared the role of KPPU in supervising business competition to *al-hisbah* institution in Islam, this study finds out that KPPU, in general, is similar to *al-hisbah* on account that the substance and the values contained in *al-hisbah* have been embedded in KPPU especially in upholding *amar ma'ruf nahi munkar* in economic activities and business competition.

**Keywords:** contextualization of *al-hisbah*, business competition law, Indonesia

**Abstrak:** *Al-Hisbah Kontekstualisasi dalam Hukum Persaingan Usaha di Indonesia.* Pengawasan kegiatan dan persaingan pasar dalam Islam telah ada sejak zaman Rasulullah bahkan sekaligus menjadi salah satu tugas seorang pegawai yang disebut *muhtasib* (pengawas). *Al-hisbah* sebagai lembaga pengawas kegiatan ekonomi dan persaingan pasar bertujuan untuk menegakkan *amar ma'ruf nahi munkar*. KPPU, sebagai lembaga independen, bertugas untuk mengawasi praktik larangan monopoli dan persaingan usaha tidak sehat di Indonesia dengan asas demokrasi ekonomi yang mendukung ekonomi kerakyatan sebagai pondasi pembangunan ekonomi nasional. Metode penelitian ini menggunakan metode yuridis-normatif dengan pendekatan historis dan pendekatan konseptual. Setelah membandingkan peran KPPU dalam pengawasan persaingan usaha dengan peran lembaga *al-hisbah* dalam Islam penelitian ini menemukan fakta bahwa KPPU secara umum mirip dengan lembaga *al-hisbah* dikarenakan substansi dan nilai-nilai yang terkandung dalam KPPU sama dengan yang ada dalam lembaga *al-hisbah*, khususnya dalam upaya menegakkan *amar ma'ruf nahi munkar* di bidang ekonomi dan persaingan pasar.

**Kata Kunci:** kontekstualisasi *al-hisbah*, hukum persaingan usaha, Indonesia

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## Introduction

The development of sharia-based economies in Indonesia continues to increase significantly, along with the development of Indonesia as a country with a Muslim population and the development of Islamic civilization at the world level.<sup>1</sup> Even though Indonesia is not an Islamic State, the condition of Indonesia which is predominantly Muslim has made Sharia-based economic activities tend to be preferred and has special markets. This tendency brings about consequences where all activities that occur in the business world, both involving goods and services industries, must be following Islamic principles from the production process, marketing to consumption.

Running a business indeed need special strategies so that the purpose of doing business can be obtained. This is what then drives a businessman to strive in finding ways to dominate the market and defeat its competitors. The ways or paths that they take can vary, ranging from fair and healthy ways to the ways that are evil and deviate from business ethics. If the business actors use a fairway, the business world will run conducive and just. In contrast, if they resort to evil ways, the business world will be controlled only by a handful of entrepreneurs and will also attract unhealthy business practices such as monopoly, oligopoly, monopsony, oligopsony, cartels, and so forth. Therefore, business actors need to be briefed on good ways of doing business so that they can compete in a fair and healthy business world and all entrepreneurs may run business freely without crippling other business ventures.

In Indonesia, business competition is regulated in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.<sup>2</sup> This law exists to improve the face of the Indonesian business and financial world from the practices of fraud and injustice committed by entrepreneurs. The law regulates activities

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<sup>1</sup> Angkat Poenta Pratama, Hari Sutra Disemadi, and Paramita Prananingtyas, 'Existence and Position of Islamic Economic Laws In Indonesia', *Legality : Jurnal Ilmiah Hukum*, 27.2 (2019), 222–31 (p. 122) <<https://doi.org/10.22219/jihl.v27i2.10159>>.

<sup>2</sup> Hari Sutra Disemadi and Kholis Roisah, 'The Enforcement of Business Competition Law by the Police: An Indonesian Experience', *Lentera Hukum*, 6.2 (2019), 203–212 <<https://doi.org/10.19184/ejllh.v6i2.12013>>.

that must be avoided by business actors in conducting their business and gives authority to the Business Competition Supervisory Commission (KPPU) to carry out and refute questioning monopolistic efforts and unfair business competition.<sup>3</sup>

In the history of Islam, supervision of financial activities and the business world must have existed since the time of the Prophet Muhammad. This oversight is carried out by an institution called *al-hisbah* which is an attempt to do good dan leave evil (*al-amru bi al-ma'rūf wa nahy 'an al-munkar*).<sup>4</sup>

Narrated by Abu Hurairah in the hadith:

حدثنا علي بن حجر، حدثنا اسماعيل بن جعفر، عن العلاء بن عبد الرحمن، عن ابيه، عن ابي هريره، ان رسول الله عليه وسلم مر علي صبرة من طعام (ياصاحب الطعام ! ما هذا؟) قال : فأدخل يده فيها فنالت اصابعه بللا فقال اصابته السماء يا رسول الله قال: (( افلا جعلته فوق الطعما حتى يراه الناس؟)) ثم ال ((من غش فليس منا))

*“That Rasulullah SAW. Once upon a time walked through a package containing food (in the market), then Rasulullah SAW put his hand into the food package. then the finger Rasulullan SAW got wet after touching the food. Then he asked the food seller, “O seller, why is this food wet?” then the seller answered “This food is exposed to rain”. Then Rasulullah SAW said “Why don’t you put it on top so that it can be seen by the crowd ? while saying “Whoever is cheating, Then he is not from our circle “(HR. Tirmizi).<sup>5</sup>*

<sup>3</sup> Alum Simbolon, ‘Kedudukan Hukum Komisi Pengawas Persaingan Usaha Melaksanakan Wewenang Penegakan Hukum Persaingan Usaha’, *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, 24.3 (2012), 529–41 (p. 530) <<https://doi.org/10.22146/jmh.16123>>.

<sup>4</sup> Ririn Noviyanti, ‘Lembaga Pengawas Hisbah dan Relevansinya pada Dewan Syariah Nasional (DSN) dan Dewan Pengawas Syariah (DPS) di Perbankan Syariah Indonesia’, *Millah: Jurnal Studi Agama*, 15.1 (2015), 29–50 (p. 30) <<https://doi.org/10.20885/millah.vol15.iss1.art2>>.

<sup>5</sup> Imam Tirmizi, *Sunan al-Tirmizi* (Beirut: Darul Kutub Al-‘Ilmiyah), p. 340.

Islamic Sharia does not only forbid trade in illicit goods such as alcohol, pornographic products but also regulates healthy business practices to create economic activities that are right and beneficial to society in both social and economic systems. *Al-hisbah* Institute has an important role as a supervisory institution to enforce market activities following the provisions of the Shari'ah to provide benefits for humans in the social, political, economic and religious life.

This study examines the role of the *al-hisbah* institution based on the historical background to find out the principles and philosophies that underlie it and its role in the supervision of the business world in the past. The picture obtained is then elaborated and linked to business competition law in Indonesia to realize fair and healthy business activities in the country.

This research belongs to the type of juridical-normative research using a historical approach and conceptual approach.<sup>6</sup> A historical approach was taken to examine the background of the *al-hisbah* institute and examine the functions and principles that apply in it, especially in carrying out its role as an economic supervisory institution in the time of the Prophet Muhammad (PBUH); Whereas the conceptual approach is used to discover and compile new concepts that can be used to develop the roles and functions of economic supervisory institutions in Indonesia following Islamic values.<sup>7</sup> Data obtained from secondary sources in the form of primary, secondary and tertiary legal materials (journals, books, laws, and other related sources), which are then analyzed using qualitative juridical analysis, in the sense of not being analyzed with statistical formulas but rather with an interpretation approach law and legal construction by deductive thinking.<sup>8</sup>

<sup>6</sup> Peter Mahmud Marzuki, *Penelitian Hukum, Edisi Revisi* (Jakarta: Prenadamedia Group, 2015), pp. 134–36.

<sup>7</sup> Hari Sutra Disemadi and Kholis Roisah, 'Kebijakan Model Bisnis Bank Wakaf Mikro Sebagai Solusi Pemberdayaan Ekonomi Masyarakat', *Law Reform*, 15.2 (2019), 177–94 (p. 182) <<https://doi.org/10.14710/lr.v15i2.26176>>.

<sup>8</sup> Soetandyo Wignjosoebroto, *Hukum: Konsep dan Metode* (Malang: Setara Press, 2013), p. 52.

## An Overview of the *al-Hisbah* Institute

### a. Definition

*Al-hisbah* is derived from the basic Arabic word “*hasaba-yahsubu*” which means “to think” and “to number”. Abi Husayn, as quoted by Adam Drahman and Suhaimi Ab. Rahman, mentions that *hisbah* originated from “*ha-sa-ba*” which has various meanings, namely “numbers, pride, adequate, and reward”. According to Khairul Anwar, as also quoted by Adam Drahman and Suhaimi Ab. Rahman, the word “*ha-sa-ba*” in the Qur’an was mentioned 109 times which means “to think, count, judge and also include the day of reckoning”.<sup>5</sup> According to Al-Mawardi, the term *al-hisbah* means the system of *amar ma’ruf nahi munkar* (commanding the good and prevent from evil or bad things).<sup>9</sup> The call is clearly written in the Qur’an in Surat Ali-‘Imran verse: 104 which reads:

9  
 وَلْتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَأُولَئِكَ هُمُ الْمُفْلِحُونَ

“And let there be among you a group of people who call for righteousness, command the good and prevent from evil; they are the lucky ones.” (Qur’an, 3: 104)

In another Surah, An-Nahl verse: 90 Allah Says:

9  
 ﴿إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَايِ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ﴾

“Verily, Allah commands (you) to behave fairly and to do good, to give to relatives, and God forbids cruel, evil and hostility. He teaches you so that you can take lessons”. (Qur’an, 16:90)

The call to do “*amar ma’ruf nahi munkar*” is also found in the hadith of the Messenger of Allah: “Whoever among you sees evil, so he should change it with his hands (the power he has). If he is unable, with his tongue (giving advice). If he is not able, let it be with his heart (avoiding that action), that is the weakness of faith” (HR. Muslim).

<sup>9</sup> Adam Drahman and Suhaimi Ab Rahman, ‘Konsep dan Aplikasi Hisbah dalam Perniagaan Produk Halal’, *Journal of Fatwa Management and Research*, 2019, 25–44 (pp. 28–29) <<https://doi.org/10.33102/jfatwa.vol18no1.3>>.

Muhammad Al-Mubarak, as quoted by Rahmat Fawza, defines *al-hisbah* as a religious institution of the government that functions to oversee activities in the moral, religious and economic fields with Islamic principles to create truth and justice in the public interest. Nicola Ziedah defines *al-hisbah* as an institution that has a control function in the general market and moral control. From these definitions it can be concluded that *al-hisbah* is a special institution formed by the government whose task is to enforce “*amar ma'rūf nahi munkar*”, especially to supervise economic activities in the market, protect market activities from certain party imbalances, and take corrective actions in the event of an unhealthy market situation.<sup>10</sup> Upholding “*amar ma'rūf nahi munkar*”, does not away from the level of one's faith, even in situations of the weakness of faith, it is still required to continue to uphold justice.

#### b. Main Pillars of *al-Hisbah*

The *Hisbah* Institute consists of:

1. *Muhtasib*, a person who is legally chosen and appointed by the priest/government to carry out the task of *hisbah* in the community that is upholding the truth and fighting against evil. To become a *muhtasib*, one must meet several requirements including:
  - a. Muslim and *Mukallaf* (adults and can act to carry out the task of *hisbah*).
  - b. True Believer, not *fāsiq* people, able to act fairly, understand Islamic law and can be trusted in delivering news.
2. *Muhtasib 'alayhi*, i.e individual who commit bad behavior (*al-munkar*).
3. *Muhtasib Fih*, the act that is prevented. The act that is prevented includes all acts of neglect or badness among all ages.
4. *Nafs Al-Ihtisāb*, the way to prevent *munkar*.<sup>11</sup>

<sup>10</sup> Journal Manager At-Tasriy and Fawza Rahmat, 'Penerapan al-Hisbah di Nangro Aceh Darussalam Sebagai Bentuk Penerapan Nilai-Nilai Ekonomi Islam', *At-Tasyri'y : Jurnal Prodi Perbankan Syariah*, 2.1 (2019), 54–63 (p. 56).

<sup>11</sup> Noviyanti, pp. 34–35.

### c. Function and Role of the *al-Hisbah* Institution

Ibn Taimiyah, as quoted by Ririn Noviyanti, explained the function of *al-hisbah* in general as a system of implementing the supervision of virtues and obligations relating to religion and shari'ah, as well as overseeing practices that include the quality of goods and management.<sup>12</sup>

*Al-hisbah* function is not limited to economic aspects, there are also social, political, and religious aspects. In the economic aspect, the main functions of the Hisbah institution are:

1. Ensuring that products are marketed *halāl* (religiously permitted) and following the provisions of the Sharia.
2. Prevent the practice of fraud, fraud in prices and fraud in products.
3. Prevent usury practices and price manipulation
4. Control pricing.<sup>13</sup>

*Al-hisbah* institution has 2 (two) roles, namely as a regulator of economic activity and as a supervisor of market behavior. In regulating economic activities, the main task of the *al-hisbah* institution is to ensure compliance with regulations so that all business actors are protected and prevented from the fraudulent business. In this way, it can be expected that a safe and comfortable situation in the business world can be realized while creating good investment and economic growth. The institution is also assigned to oversee and protect the public interest, regulate transactions in the market, and forbid the creation of waterways without need.

In carrying out its role as the supervisor of market behavior, the *al-hisbah* institution is tasked with overseeing the activities of buying and selling in the market to be carried out freely. Every seller cannot force other sellers to sell certain goods or set a certain nominal price, because the concept of perfect competition in Islam is that no parties

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<sup>12</sup> Noviyanti, pp. 34–35.

<sup>13</sup> Zulfaqr Mamat, 'Institusi Hisbah dan Peranannya dalam Mengawal Kegiatan Ekonomi Negara Islam', *E-Muamalat*, pp. 122–31 <<http://e-muamalat.islam.gov.my/ms/bahan-ilmiah/jurnal-muamalat/120-insstitusi-hisbah-dan-peranannya-dalam-mengawal-kegiatan-ekonomi-negara-islam>> [accessed 13 Oktober 2019].

may obstruct or force commercial activities in the market. Apart from that, the *al-hisbah* institute is also assigned to regulate the marketing and expansion of the sales area so that they remain in the Islamic Sharia corridor without bringing down other sellers, preventing stockpiling, monitoring price developments, and the entry of imported goods.<sup>14</sup>

### **Business Competition Law and the Prohibition of Monopolistic Practices in Indonesia**

Monopolistic practices and unfair business competition have become serious issues among global business actors, including in Indonesia. Article 33 of the 1945 Constitution of the Unitary State of the Republic of Indonesia implicitly emphasizes that the national economy must be built based on a people's economy to realize social justice for all Indonesian people.<sup>15</sup> Based on these provisions, monopolistic actions and unfair business competition should not exist in this country. This is because monopolistic practices will result in the concentration of economic power and the control of production and or marketing of certain goods and or services by a handful of people, resulting in unfair business competition and harm to the public interest.

In Indonesia, the law on the enforcement of business competition and monopolistic practices is contained in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

According to the law, "monopoly and monopolistic practice" has the following meanings:

*"Monopoly is control over the production and/or marketing of goods and or on the use of certain services by one business actor or a group of business actors"*

<sup>14</sup> Antin Rakhmawati, 'Implementasi Lembaga Hisbah dalam Meningkatkan Bisnis Islami | Malia (Terakreditasi)', pp. 322–28 <<https://jurnal.yudharta.ac.id/v2/index.php/malia/article/view/383>> [accessed 13 October 2019].

<sup>15</sup> Muh Risnain, 'Konsep Penguatan Kewenangan Komisi Pengawas Persaingan Usaha Sebagai Lembaga Quasi-Peradilan dalam Membangun Perekonomian Nasional yang Sehat dan Adil', *Jurnal IUS Kajian Hukum dan Keadilan*, 6.2 (2018), 219–34 (p. 222) <<https://doi.org/10.29303/ius.v6i2.557>>.

*“Monopolistic practice is the concentration of economic power by one or more business actors which results in the mastery of the production and or marketing of certain goods and or services so that it creates unfair business competition and harm the public interest”.*<sup>16</sup>

While “unfair business competition” is clearly defined in the same law in Article 1 Paragraph 6 which reads as follows:

*“Unfair business competition is competition among business actors in carrying out production and or marketing activities of goods and or services carried out in a way that is not honest or against the law or inhibits business competition”.*<sup>17</sup>

The presence of business competition and anti-monopoly law in Indonesia indicates the government’s seriousness in realizing democratic national economic development and ensuring business security and comfort for all business actors from unfair and dishonest acts committed by business actors with the goal is to dominate the market and get their profit. The purpose of the issuance of rules regarding the Prohibition of Monopoly and Unfair Business Competition includes: to prevent monopolistic practices and or unfair business competition carried out by business actors, as well as to create effectiveness and efficiency in business activities, creating a conducive business climate, as an effort to improve people’s welfare and safeguard the public interest. This business competition arrangement applies to all classes of business actors, ranging from large, medium and small business actors.<sup>18</sup>

With this regulation, business actors in Indonesia can be directed so that in carrying out their business activities based on economic democracy by taking into account the balance between the interests of business actors and the public interest. The principle of economic democracy is an elaboration of Article 33 of the 1945 Constitution, which requires that the basis of people’s economy be the basis of national economic development.<sup>19</sup>

<sup>16</sup> Article 1, paragraphs 1 and 2, The Law No. 5/1999

<sup>17</sup> Article 1, paragraph 6, The Law No. 5/1999

<sup>18</sup> Andi Fahmi Lubis, dkk, *Hukum Persaingan Usaha Buku Teks*, Kedua (Jakarta: Komisi Pengawas Persaingan Usaha (KPPU), 2017), p. 36.

<sup>19</sup> Andi Fahmi Lubis, dkk, *Hukum Persaingan Usaha Antara Teks & Konteks* (Indonesia:

### KPPU's Position in Law Enforcement of Business Competition

So that all the provisions contained in Law no. 5/1999 can be implemented, it is necessary to have a special institution, that is, in this case, the Business Competition Supervisory Commission (KPPU). KPPU is positioned as an oversight body implementing the Law on the Prohibition of Monopolistic Practices and Unfair Business Competition independently, regardless of government intervention or other parties. The authority attached to KPPU is administrative authority, in the sense that sanctions given by KPPU are administrative in nature. KPPU members are appointed and dismissed by the President with the approval of the DPR. The responsibility of KPPU members is direct to the President, but the nature of its independence will not be affected by any intervention.<sup>20</sup>

KPPU has specific duties and authorities contained in article 35 of Law 5/1999 letter a through letter g and article 36 letter a through letter l. Among KPPU's tasks according to the Law are:

- a. Evaluating agreements that may result in monopolistic practices and or unfair business competition;
- b. Evaluating business activities and or actions of business actors that may result in monopolistic practices and or unfair business competition;
- c. Conduct an assessment of the presence or absence of an abuse of a dominant position that may result in monopolistic practices and or unfair business competition;
- d. Take action following the authority of the Commission;
- e. Provide advice and considerations on Government policies relating to monopolistic practices and or unfair business competition;
- f. Prepare guidelines and or publications relating to this Law;
- g. Provide periodic reports on the work of the Commission to the President.<sup>21</sup>

Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), 2009), p. 14.

<sup>20</sup> Ibid.

<sup>21</sup> Article 35, The Law No. 5/1999

While its authority includes:

- a. Receive reports from the public and or business actors regarding the alleged monopolistic practices and or unfair business competition;
- b. Conduct research on the alleged existence of business activities and or actions of business actors which may result in monopolistic practices and or unfair business competition;
- c. Investigating and/or examining cases of alleged monopolistic practices and or unfair business competition reported by the public or by business actors or that were found by the Commission as a result of their research;
- d. Conclude the results of an investigation and/or examination regarding the presence or absence of monopolistic practices and or unfair business competition;
- e. Summon business actors suspected of having violated the provisions of this law;
- f. Summon and present witnesses, expert witnesses, and anyone who is deemed aware of violations of the provisions of this law;
- g. Request the assistance of investigators to present business actors, witnesses, expert witnesses, or anyone referred to in letter e and letter f, who are not willing to fulfill the Commission's summons;
- h. Request information from Government agencies in connection with investigations and or examinations of business actors violating the provisions of this law;
- i. Obtain, examine, and or assess letters, documents, or other evidence for investigation and / or inspection;
- j. Decide and determine the presence or absence of losses on the part of other business actors or the public;
- k. Notify the Commission's decision to business actors suspected of monopolistic practices and or unfair business competition;
- l. Impose sanctions in the form of administrative action on business actors who violate the provisions of the Law.<sup>22</sup>

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<sup>22</sup> Article 36, The Law No. 5/1999.

## ***Al-Hisbah* Contextualization in Business Competition Law in Indonesia**

It has been stated above that the main function of *al-hisbah* in the economic sector is to supervise market behavior so that it may continue to run in a fair corridor, to create a comfortable, healthy and fair business competition. *Al-hisbah* has the authority to make a reprimand and intervention when a violation is committed by a businessman and forward the case to the court hearing. This is a manifestation of the institution's efforts in carrying out the task of *amar m'arūf nahi munkar* (ordering the good and preventing the evil).

The role and function of the *al-hisbah* institution above, when compared to the role and function of the Business Competition Supervisory Commission (KPPU), shows the similarities as well as differences. In terms of vision and mission, *al-hisbah* and the KPPU were formed for the same purpose of realizing a healthy market competition situation and preventing fraudulent/deviant practices by employers. Another similarity is that *muhtasib* (*al-hisbah* officials) are appointed by the head of state/ Imam as well as KPPU officials who are appointed and dismissed by the President with the approval of the DPR. Besides, to be elected, whether to be a *muhtasib* or a member of the KPPU, one must have special skills and be able to carry out the mandate and responsibility as supervisors of business/economic activities.

The two institutions differ only in the breadth of authority; the authority of *al-hisbah* is broader than that of the KPPU, because the scope of *al-hisbah* supervision is not only limited to supervision in the economic *mu'amalah* area but also includes supervision of God's rights.

## **Conclusions**

Although it does not appear explicitly, in general, the substance and values contained in the Hisbah institution have been embedded in the KPPU. Both *al-hisbah*, as an institution tasked with upholding *amar m'arūf nahi munkar's* in economic activity and market competition, and KPPU, as an institution that oversees business competition and monopolistic practices, aims to supervise transactions in the market, and

regulate activities the economy to avoid cheating in commerce. With this supervision and regulation, a safe and comfortable situation in business life can be realized.

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