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LEGAL ENVIRONMENT FOR BDS IN VIETNAM

A Study of the Legal Environment for Business Development Services (BDS) in Vietnam with focus on Training Services, Accounting & Auditing Services and Intellectual Property Services

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- BRIEF SUMMARY -

The overall aim of the SME Promotion Project of German Technical Cooperation in Vietnam is to promote the competitiveness and the sustainable growth of small and medium enterprises (SMEs). For this purpose, a conducive policy framework and a functioning market for Business Development Services (BDS) are essential, and are thus the main focus of the Project.

The effective development of the BDS market in Vietnam is still affected by various obstacles, many of them related to regulatory constraints. Earlier research (BDS Market Assessment Study undertaken in 2001 by German Technical Cooperation together with Swisscontact Vietnam) highlighted the importance of improving the regulatory framework for BDS, with a view to creating an enabling environment for BDS market development.

The present study is intended to follow up on these concerns and to provide a comprehensive overview of key issues governing the legal environment for BDS market development in Vietnam. It analyses in detail the regulatory framework for three business services, which have been selected based on their relevance for the development of the private sector, and the importance of addressing legal concerns related to their development. It specifically focuses on Training, on Intellectual Property Services, and on Accounting and Auditing Services.

The study has been carried by some of the key stakeholders and resource institutions in the field of BDS and private sector development: It has benefited from a very close and effective cooperation between the GTZ, the Central Institute of Economic Development (CIEM) and the Vietnam Chamber of Commerce and Industry (VCCI). Vision & Associates with inputs from Deacons Vietnam played a key role in conducting the study and undertaking the lion's share of the analytical work.

This Study provides an overview of the policy and regulatory environment and its constraints to the BDS market in Vietnam, serving as basis for in-depth analysis of the policy and regulatory constraints for three selected services: intellectual property, training, and accounting and auditing services. It also makes recommendations for addressing constraints at various levels, and how to develop and implement a comprehensive and integrated approach for strengthening and supporting the creation of a level playing field for private sector providers of the three service markets.

This Study identifies the following main constraints, arising from the legal environment that adversely impact on the development of the BDS market in general and three service groups in particular:

BDS markets as a whole

- Legal environment plays an important role in the development of BDS markets. The deregulation of many sectors and liberalization of many service sectors have led to a boom in many BDS markets. As a whole, the whole BDS markets have benefited from the Enterprise Law and other more liberal economic policies of the government. BDS markets have been growing rapidly both in terms of demand and supply.
- Still the inadequate implementation of the Enterprise Law has resulted in adverse impacts on the development of some BDS markets. Some local People's Committees set their own conditions for enterprise registration, conditions that are not regulated by the Enterprise Law. Invisible barriers have blocked the entry into the market of many BDS providers and imposed restrictions on the activities of those already in operation. Some local-level stipulations or legal documents directly contradict the Enterprise Law, adversely impacting on growth of some BDS markets.
- Some important subordinate legal documents of the Enterprise Law have not yet been completed. For example, there are not sufficient legal instruments to guide the business registrar in approving names for newly registered enterprises, or withdrawing business registration certificates.
- The Law on Bankruptcy, issued in 1993, has not kept pace with economic development. Many provisions of the Law are not suitable and not sufficiently specific, making actual implementation difficult and very rare. This also has impact on BDS suppliers, given that they face difficulty in determining which customers really need their services. This not only reduces the efficiency of available BDS but also directly impacts on the existence and development of corporate BDS suppliers.
- Decree 87/2002/ND-CP on consulting services requires consultants to practice via certain consulting organizations/enterprises. This Decree contains stipulations that contradict the spirit of the Enterprise Law. The Decree imposes constraints on the entry into the market of consulting service providers. The Decree should be revised.
- While the National Assembly (NA) has issued the Law on Domestic Investment Promotion and the Government has issued Decree 90/2001/ND-CP, setting forth a number of measurements for promotion of business, in general, and small-to-medium-sized enterprises (SMEs), in particular, there remains a shortage of legislation in support of the business of BDS provision.

Intellectual Property (IP) Services

- In addition to the lack of adequate State and Party policies on intellectual property (IP) management, Vietnam has no comprehensive strategy enhancing public awareness in relation to IP rights protection. There is no separate law on IP, as exists in many other countries. At present, IP-related provisions are stipulated in a variety of laws, decrees, decisions and circulars.
- In theory and practice, the NOIP (previously National Office of Industrial Property) is officially identified only as a state management body. Its provision of public services is inadequate due to its lack of labor and financial resources. This has resulted in delays in NOIP's activities and prolonged the settlement of IP cases.
- The current situation of four separate IP right establishment systems is not tenable in the long run and does not accord with international practice. It is unnecessarily cumbersome with regards to: (i) the number of legal instruments issued by different authorities of four systems; (ii) human resources; and (iii) information systems which are formed and managed by the four systems separately.
- Current provisions result in the enforcement of IP rights in Vietnam being undertaken by a variety of State authorities, including the system of the People's Courts, People's Procuracy, market management forces, police, and customs offices.

The inspectors of some Ministries have also played an unconstructive role in IP rights enforcement. The complicated IP rights enforcement system has not been effective in providing businesses with the protection they need.

- There is currently no framework for the establishment of a separate court specializing in IP rights dispute settlement. General civil procedures are unreasonably applied to the settlement of IP related cases. Despite the intricacy of IP disputes, the legal documents guiding settlement of IP cases are outdated and judges are not required to specialize in IP.
- Enforcement authorities are heavily dependent on the professional opinions of the NOIP, and lack information and relevant backgrounds relating to IP. The result is a very passive approach to enforcement and a prolongation of the settlement of IP cases.
- Inappropriate regulations governing IP service providers result in a limited number of providers that monopolize the market. The barriers to entering the IP service market are too high. Chief among these barriers among is the requirement of having at least 2 professionals hold IP agent certificates. This condition should be removed.
- There exists deep interference by the state in technology transfer activities, especially permitting MOST to establish requirements or limits on the contents of the TTAs between parties. This limits the rights of the contracting parties, and at the same time causes difficulties for enterprises outside of Hanoi, where MOST is located.
- While franchising is an increasingly common practice throughout the world, the concept does not yet exist in the current Vietnamese legal provisions. Franchising agreements are deemed to be a trademark license and/or technology transfer contract, and therefore are subject to different regulations under current Vietnamese law. This frustrates the development of franchising in Vietnam and wastes the time and money of enterprises wishing to enter into franchising agreements approved by and registered with the responsible authorities.

Auditing and Accounting (A&A) services

- The absence of a clear-cut policy and action plan for the development of A&A services is seen as a great constraint for the sector. The lack of compulsory application of audited financial statements for businesses of all types obviously hinders the development of the A&A service market.
- Uncertain establishment procedures present an obstacle to new entrepreneurs wishing to provide A&A services in the market. There currently exist impractical and overlapping regulations, and is no comprehensive regulation regime for the operation of A&A service providers.
- Inappropriate regulations on the provision of A&A services hinder market development. Such constraints include: the independence of A&A service providers in the course of rendering services, the lack of legal provision on the validity of audited financial statements, the complex procedures required for the provisions of A&A services to credit institutions and listed companies.
- Controversial regulations on fixed ceiling prices of auditing services are currently in place. Specifically, the MOF is empowered to fix the ceiling price for auditing work conducted by auditors/auditing firms. This is contrary to the basic principles of economic and civil transactions.
- The lack of a comprehensive accounting/auditing standard system generally obstructs the development of the A&A market.
- Laws significantly limit the tax deductibility of expenditures. Actual implementation of the laws by tax officers is sometimes inconsistent and restricts business development. Audited financial reports are not always recognized by tax authorities.

Training Services

- The policy for development of training services is general and lacks detailed provisions. In addition, training activities also face difficulties owing to the complex and unclear management system between the MOLISA, the MOET and other agencies.
- The separation of MOLISA and MOET's functions on management of vocational training schools is unclear. This lack of clarity serves as an impediment to investment into improvement vocational training networks and to their proper management.
- The procedures on establishment of vocational training providers are neither transparent nor specific. This discourages the entrance of new training providers into the market, hindering development of breadth and depth of such services.
- The required criteria for a potential entrepreneur to establish a vocational training school are too high, and the procedures are too complicated, time consuming, and costly. Establishment procedures should be streamlined, simplified, and made transparent. This would help to increase the number of entrants into the vocational training service market.
- Incentive policies for vocational/technical training have not been implemented. Generally speaking, there are inadequate policies for the enhancement of business management training systems.
- The lack of legal provisions on trainees' rights leave trainees in a weak legal position, with little leverage to ensure they receive high quality service.
- Laws limit the amount of reasonable expenses to be deducted from taxable income for training services.