

THE LEGAL ENVIRONMENT FOR BUSINESS DEVELOPMENT SERVICES IN VIETNAM

A CASE STUDY ... on the Impacts Generated in Advocating for a More Enabling Environment for BDS in Vietnam

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I. BACKGROUND

The overall aim of the GTZ SME Promotion Project 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.

To better understand the functioning of the market, and with a view to adequately designing its strategy for BDS market development, in 2001 the Project – in cooperation with Swisscontact Vietnam – has undertaken a BDS Market Assessment Study, covering the following services: accounting & auditing; business management training; business management advisory, legal consultancy, advertising/promotion, market research, product design, trade fair participation arrangement and advisory services, quality management and environment management training and advisory, management information system software, internet, and computer related services.

The study was considered a success. The findings of the study have been frequently quoted by the Government and its line agencies, e.g. in the Comprehensive Poverty Reduction and Growth Strategy (CPRGS), adopted in 2002, and various government papers. Furthermore, the results have been widely disseminated to domestic stakeholders through workshops, press and direct advisory inputs. The results of the study have also been used by other donors in their programme design and interventions. The study specifically highlighted the importance of improving the regulatory framework for BDS, with a view to creating an enabling environment for BDS market development. In this context, the study emphasized in particular:

- the importance of levelling the playing field between public sector service providers and private companies to stimulate private sector investment in BDS markets;
- the need to address the lack of competition in controlled markets (the Internet and the media) as this has resulted in low quality services;

- the importance of looking at the effects of subsidized provision on the demand for, as well as the private supply of services. Subsidies from the Government, donors and social organizations should be shifted from transactions to improving the commercial supply of services and increasing the availability of information about services and providers.

Based on the recommendations of the study, the Project decided to move ahead with a study on the policy and legal environment for BDS in Vietnam, considering it an important tool to advocate for a more enabling environment for BDS markets in Vietnam.

The overall objective of this study has been to (i) provide an overview on the policy and regulatory environment for the business development services market in Vietnam; (ii) to identify and better understand the policy and regulatory constraints to the development of BDS; (iii) to provide inputs and recommendations to support different BDS market players in advocating for a more consistent and enabling policy and regulatory environment for the BDS market; and to identify factors which favour or could potentially favour an increasing availability and usage of services.

The specific objectives of the study include: (i) to provide a detailed analysis of the policy and regulatory environment for a limited number of services subject to study; (ii) to specifically identify the policy and regulatory constraints for each of these service markets; (iii) to provide recommendations to address constraints at various levels, developing and implementing a comprehensive and integrated approach for strengthening and supporting the creation of a level playing field for private sector providers.

Through workshops, forums, and other follow-up activities, the findings and recommendations of the study would be discussed with and disseminated to different players, particularly those who play important roles in influencing the regulatory environment for certain BDS.

In its planning objectives, the GTZ SME Promotion Project aims at: (i) **at least 3 specific and implementable proposals** to be made by local stakeholders for legal changes in favour of BDS market development in Vietnam; (ii) tangible improvements in at least 2 areas achieved. The changes could be in any form, either an easier entry into the market by BDS providers in a selected market, or less problems in the transaction of business development services between the providers and users.

II. THE PROCESS

The study was initiated in June 2002 and finished in December 2003. While it was a long process, it proved to be very effective in terms of impact and outcomes. Unlike many other studies, the findings and results from the study were put into use by policy makers immediately—in some cases, even while the study was still in progress. Policy advice and advocacy institutions did not wait for the study to be finalized before they used the results as a basis and as inputs for policy making and advocacy.

1. The Key Stakeholders Involved in the Study

The study was implemented under a partnership between a private law company (Vision and Associates), a public agency/government think tank (Central Institute of Economic Management - CIEM) and the national Chamber (Vietnam Chamber of Commerce and Industry - VCCI).

CIEM is a Government think-tank on economic issues. Through the Taskforce for the Implementation of the Law on Enterprise (LOE), on which many of its staff act as members, the Institute possesses a clear advantage in using the study as an input for its advisory and regulatory design role. VCCI, the biggest representative of the business community, is the Government's key dialogue partner on business issues.¹ Finally, Vision and Associates played a key role in conducting the study and undertaking the lion's share of the analytical work.

International experience and perspectives have been provided through an international law firm (Deacons, Prof. Andrew Terry) and an international BDS research and training centre (Springfield Centre, UK – Rob Hitchins). The international experts provided advice in terms of report structure, report focus, international norms, and best practices to the team throughout the implementation process.

GTZ provided additional advice and inputs and coordinated the whole study.

2. The Services Captured in the Study

The study was undertaken in two steps: the preliminary study and the full-fledged study. The preliminary study was conducted as an exploration into the subject since there had not been any similar study implemented anywhere else before (as far as is known to us). The preliminary study turned out to be of very good quality in terms of content and it helped the Project to outline the structure, focus and methodology for the full-fledged study. CIEM even started to use the results from the preliminary study for its policy advisory work. In the preliminary study, the following services were included: *(1) Consulting (for example, market research, technology transfer, and product design) services as a whole; (2) Training; (3) Accounting & auditing Consulting; (4) Legal services; (5) Quality and environment management; (7) Management information system and computer related services; (8) Business information and Internet based information service; and (9) Advertisement.*

The full-fledged study was limited to only three services, including: **(1) Intellectual Property Services; (2) Accounting & Auditing Services; and (3) Training Services.** This narrowing-down in number of services ensured a more in-depth analysis of the service markets in question considering that there is a clear trade-off between the number of the services included and the depth of the analysis. The selection of these three services for in-depth study was based on the following criteria: *(i) The interest of the local BDS facilitators in promoting for changes in the service markets; (ii) The severity of the legal constraints to the development of the service market; (iii) The importance of the*

¹ The Government has instructed that any business regulations/ laws must be consulted with VCCI before they are passed or issued.

service market to SMEs; and (iv) The feasibility of changes to be implemented based on the legal proposals and recommendations.

3. Methodology

To conduct the study, a combination of desk study and field survey was used:

Desk study has involved (i) reviewing legal instruments, (ii) gathering information from mass media, the Internet, various legal databases and reference papers; (iii) analyzing and validating the findings, (iv) drafting and reviewing the Report of the Study and (v) other related works. Reference papers, international research papers, publications, related studies were used to support the analysis of the current situation of the BDS market and the impacts of legal constraints to the market.

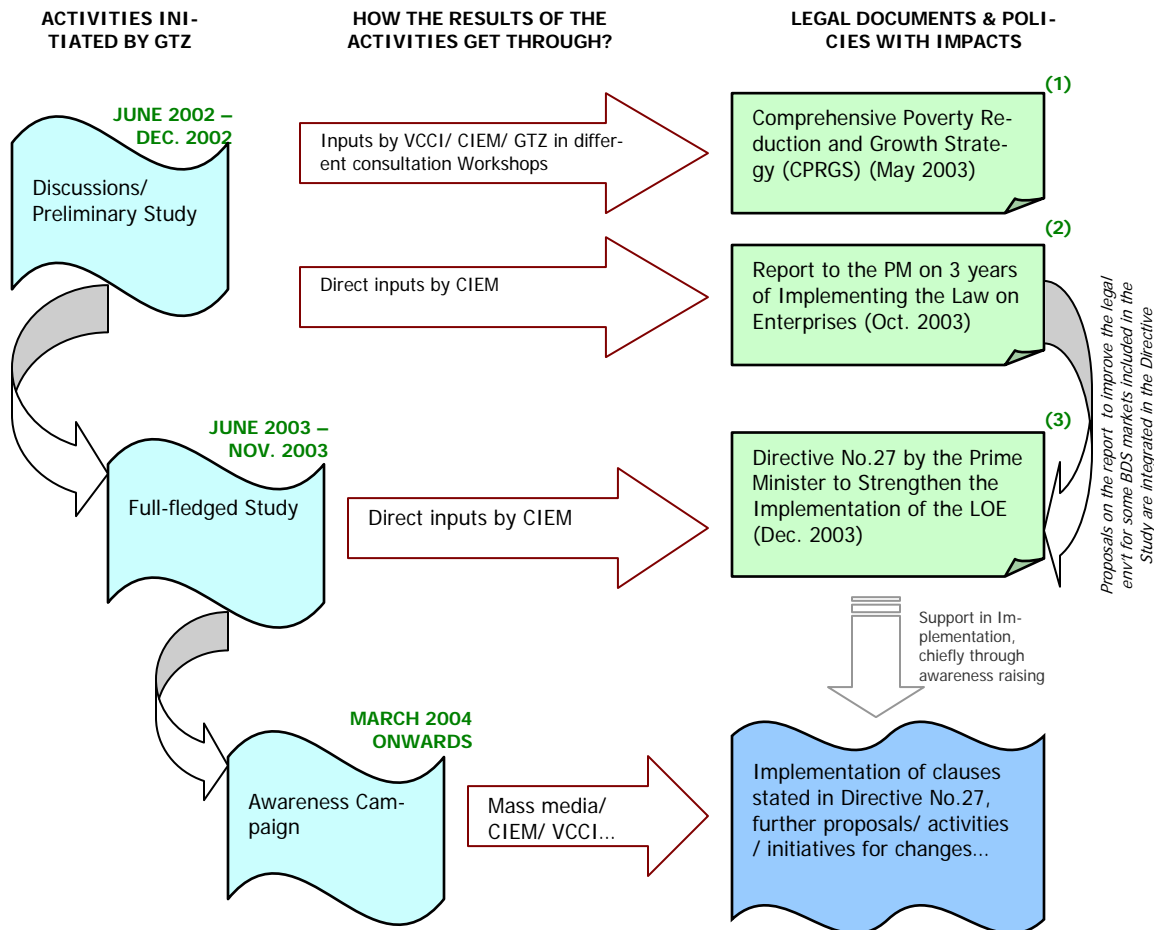
In-depth interviews and discussions were held with (i) BDS providers, (ii) customers, (iii) facilitators, and (iv) regulators. In total, 59 interviews were conducted: 21 with BDS providers (government, semi-public, private, NGOs), 12 with users, 6 with facilitators, and 20 with market regulators. Among the interviews, 6 were conducted at the provincial level (out of Hanoi and Ho Chi Minh City) in order to obtain a provincial perspective on the issues under study.

In order to help interviewers focus on the objectives of the Study, and to maximize the level of generating information from interviewees, Question Guidelines were prepared. They were used as a survey manual and interviewers read them carefully before conducting the interviews.

III. IMPACT / RESULTS ACHIEVED

CIEM and VCCI - the two key owners of the study - played a very important role in feeding the findings from the study into various national policy papers and legal documents. VCCI and CIEM, together with Vision and Associates, actually carried out the study themselves. They have strong ownership of the study. The services included in the full-fledged study were identified independently by the research team, with little influence from the GTZ SME Promotion Project.

Throughout the process, the stakeholders have fed the findings from the research through different channels into the discussion process. CIEM, for example, has integrated key elements of the analysis into its work with the Taskforce for the Implementation of the Law on Enterprise. VCCI has succeeded in using the concepts, ideas and results of the study in general awareness raising and in advocating for a more enabling environment for BDS. Vision and Associates has published articles on some local leading newspaper (e.g. the Vietnam Investment Review, the Dau Tu) on the legal environment of the BDS markets under study.



Overall, the study and the involvement of different stakeholders in the study has resulted in a **much higher awareness** on the need of a more enabling environment for BDS market development among policy making and policy advocacy institutions like CIEM, VCCI as well as various departments of the Ministry of Planning and Investment (MPI). In many cases, officials of the institutions involved, at their own initiative, have strongly advocated for a better environment for the development of BDS market, in general, and the markets for some specific services, in particular. The overall improvement in awareness has resulted in explicit and implicit commitments, instructions, requests, recommendations, planned actions which can be found in various documents and action plans of the Government. Below is a summary of the most explicit ones:

- (1) The **Comprehensive Poverty Reduction and Growth Strategy (CPRGS)**: Through different consultations workshops (e.g. those organized in Quang Binh (partly funded by GTZ), Hanoi, Ho Chi Minh City and Hai Phong) VCCI, CIEM and the Project strongly called for actions to develop commercially viable BDS markets as a tool to support enterprise development. In the final CPRGS which was approved by the Prime Minister and released in May 2002, the following actions were included in the Policy Matrix of the paper:

"... [The Government] aims at developing the legal framework for the establishment and operation of business associations; at development of **an enabling policy environment for the operation of Business Development Services (BDS) providers, regardless of their ownership structure.** [BDS refers to training, consultancy, technical advisory services, accounting and auditing services, market information services, computer services, internet and telephone, advertising...] (*CPRGS, Policy Matrix, p. 131, English version*)

"..[The Government) strongly promotes and encourages the performance of job promotion centres and **vocational training schools...**" (*CPRGS, Policy Matrix, p. 132, English version*)

- (2) **Report on 3 Years of Implementing the Law on Enterprise (LOE):** The Report was prepared by CIEM and members of the LOE Implementation Taskforce (some are also members of the BDS Legal Environment Study Team). Findings and the detailed analysis of the Preliminary BDS Legal Environment Study were used as inputs in the report. In addition to specific legal changes proposed (as described in the table below), the Report recommended a "paradigm shift" in the way in which the BDS market should be developed in Vietnam and in the modality which the Government should take to intervene in different BDS markets.

"...State agencies should gradually stay away from directly providing the business services to enterprises and focus more on the role of the facilitator, promoters and quality controller..."

"...Further supports to business associations; strengthen the capacity of BDS providers so that they can provide better services to enterprises; support and encourage consulting institutions, research institutes, universities to provide BDS under national programs..."

"...Government-run programs to support SMEs should be transparently carried out [...]. The programs should be time-bound, and should be run on a cost-sharing basis. Enterprises benefiting from the programs should gradually bear the full costs..."²

(*Report on 3 Year of Implementing the LOE, CIEM/LOE Implementation Taskforce/ MPI, Oct. 2003, page 13*).

- (3) More importantly, concrete proposals for improving the legal environment were made and the Government has listened, and instructed its line ministries to take actions with a clear deadline. The proposals were made by CIEM and the LOE Implementation Taskforce on the basis of analysis **they carried out** and problems **they identified** in the process of conducting the GTZ BDS Legal Environment Study. **Four concrete and specific proposals were made and included by**

² These changes, though they might not be considered marked changes in mindset elsewhere, are actually a paradigm shift in Vietnam on the way in which the Government tries to support enterprises. It is positive to notice that this is an increasing trend in the country and the idea is gradually permeating into policy makers' mind.

CIEM/LOE Implementation Taskforce in its report to review the 3 years of implementing the LOE in October 2003. The proposals were addressed by the Government in the Directive No.27 released in December 2003.

PROPOSAL NO.1

The BDS Legal Environment Study states that:

"...The most important concern shared by interviewers in the implementation of the Study was that the Decree [Decree No. 87 on Consulting Services] does not recognize individual and freelance consultants, requiring that individual consultants must work in a certain organization... The Decree is a clear example of a legal document that contains stipulations against the principle of the Law on Enterprises... The Decree has made entry into the market harder for consulting service providers and therefore should be revised..."

Problems Identified in the BDS Legal Environment Study and Included in the LOE Implementation Report	Proposals made for Changes in the Legal Environment in Favour of the Development of BDS Market	Actions Taken by the Government
<p>"...Some legal documents with stipulations which are against the guiding principle of the Law on Enterprise (LOE) were still issued. The most important example is the Decree No.87/ 2002/CP on Consulting Services, dated 11 May 2002 ..." <i>(Report on 3 Year of Implementing the LOE, CIEM/ LOE Implementation Taskforce/MPI, Oct. 2003, page 13)</i>³.</p>	<p>"...The Government Office, in cooperation with LOE Implementation Taskforce, should review legal documents that are against the LOE and report to the Prime Minister for removal decision..." <i>Report on 3 Year of Implementing the LOE, CIEM/LOE Implementation Taskforce/ MPI, Oct. 2003, page 37).</i></p>	<p>In Directive No.27/ 2003/CT-Ttg, issued on 11 December 2003, the Prime Minister requests that:</p> <p>"...The ministers, heads of ministerial and governmental bodies, and chairmen of provincial people's committees shall:</p> <p>Review and examine legal documents issued by ministries and local authorities that govern business activities in order to abolish, supplement or amend inappropriate provisions; draft new legislations in light of the reform policies of the Party and the State and in conformity with the road</p>

³ In this paper, the quotes from the *Report on 3 Year of Implementing the LOE* are translated from the Vietnamese Version (the original version) of the Report which dates October 2003.

Problems Identified in the BDS Legal Environment Study and Included in the LOE Implementation Report	Proposals made for Changes in the Legal Environment in Favour of the Development of BDS Market	Actions Taken by the Government
		map for international economic integration. Those State bodies that have issued regulations inconsistent with laws, ordinances and decrees must issue new legal documents to revise or remove inconsistent part of the issued regulations; at the same time, those officials who have signed these legal documents or advised on the issue of these legal documents should be dealt with in accordance with the applicable laws..." ⁴

PROPOSAL NO. 2

The BDS Legal Environment Study found that:

"... The Ordinance on Lawyers governs the operations of partnership law firms. Article 19 of the Ordinance provides that "*partnership law firms may provide legal services in the fields of legal consultancy and other legal services but must not provide legal services in the domain of legal proceedings*". This prevents partnership law firms from providing comprehensive legal services to clients. [...]. Although the Ordinance prohibits partnership law firms from acting in legal proceedings, the Ordinance does not give detailed provisions on what is a *legal proceeding*. As a result, it is unclear on whether a partnership law firms is entitled to provide legal advices, in close conjunction with a legal proceeding in the cases of their clients, for instance advice on court procedures, and what processes of the legal proceeding which partnership law firms could not participate. [...]. **There is now a great confusion and ambiguity on the conditions and criteria for the provision of legal services...**"

⁴ In this paper, the quotes from the Directive No.27/ 2003/CT-TTg issued on 11 December 2003 are are translated from the original text (Vietnamese version) of the Directive.

Problems Identified in the BDS Legal Environment Study and Included in the LOE Implementation Report	Proposals made for Changes in the Legal Environment in Favour of the Development of BDS Market	Actions Taken by the Government
<p>"...There is a lack of necessary legal instructions on business with conditions or conditionality for a number of businesses. [...] There is great confusion on the eligibility conditions and required criteria to be met to be able to provide legal services and lawyer services..." (<i>Report on 3 Year of Implementing the LOE, CIEM/ LOE Implementation Taskforce/MPI, Oct. 2003, page 13</i>).</p>	<p>"...The Ministry of Justice should issue guidelines on the granting of legal advice business certificates under the understanding that lawyers and anyone having sufficient knowledge and experience on legal matters have the full rights of providing legal services..." (<i>Report on 3 Year of Implementing the LOE, CIEM/LOE Implementation Taskforce/MPI, Oct. 2003, page 36</i>).</p> <p>"...MPI, in cooperation with the LOE Implementation Taskforce, should review the procedures of business licensing, conditionality for a number of businesses which the public considers to be irrational; and identify constraints related to the issue and then report to the Prime Minister for actions..." (<i>Report on 3 Year of Implementing the LOE, CIEM/LOE Implementation Taskforce/MPI, Oct. 2003, page 36</i>).</p>	<p>In Directive No.27/2003/CT-TTg issued on 11 December 2003, the Prime Minister requests that:</p> <p>"The Ministry of Justice shall:</p> <p>Issue in the first quarter of 2004 a Circular providing guidance on the issuance of legal service provision certificates to allow lawyers and persons with sufficient professional qualifications and experience to provide legal consultancy services..."</p> <p>"...The Ministry of Planning and Investment shall:</p> <p>Cooperate with the LOE Implementation Taskforce and relevant authorities in reviewing, assessing and classifying business licences, and then propose to the Prime Minister the measures to deal with these licenses..."</p>

PROPOSAL NO.3

The BDS Legal Environment Study found that:

"...**To be eligible** to engage in IP [Intellectual Property] agent services, an enterprise must meet all of the following conditions: (i) be a Vietnamese entity; (ii) have no foreign invested capital; (iii) have its Business Registration Certificate re-

ording its business as the provision of intellectual property services, legal services or science and technology services; (iii) *have at least two professional members having IP agents certificates* (which is extremely difficult to get) (*it is worthwhile to note here that a foreign invested enterprise is not allowed to act as an organizational IP agent in Vietnam*). **The above business conditions for IP service providers are unnecessarily high and thereby limit the number of IP service providers and contribute to creation of a monopoly in the supply of the service...".**

Problems Identified in the BDS Legal Environment Study and Included in the LOE Implementation Report	Proposals made for Changes in the Legal Environment in Favour of the Development of BDS Market	Actions Taken by the Government
<p>"...For some selected business sector, it is very difficult or even impossible for entrepreneurs to register or to expand their businesses simply because of the lack of guidelines on business conditions. [...] In some cases, business conditions are non-transparent, inaccurate, or simply too high. [...]. In summary, the principle of "citizens are allowed to do business on whatever sectors not prohibited by law" has not been fully observed...".</p> <p><i>(Report on 3 Year of Implementing the LOE, CIEM/ LOE Implementation Taskforce/MPI, Oct. 2003, page 16).</i></p>	<p>"...The Ministry of Science, Technology and Environment should cooperate with the LOE Implementation Taskforce to replace the permission mechanism of "Intellectual Property Representative Certificates" with business conditions..." <i>(Report on 3 Year of Implementing the LOE, CIEM/LOE Implementation Taskforce/MPI, Oct. 2003, page 37).</i></p> <p>"...MPI, in cooperation with the LOE Implementation Taskforce, should review the procedures of business licensing, conditionality for a number of businesses which the public considers to be irrational; and identify constraints related to the issue and then report to the Prime Minister for actions..." <i>(Report on 3 Year of Implementing the LOE, CIEM/LOE Implementation Taskforce/MPI, Oct. 2003, page 36).</i></p>	<p>In Directive No.27/2003/CT-Ttg, issued 11 December 2003, the Prime Minister requests that:</p> <p>"...The Ministry of Science and Technology [shall]:</p> <p>Co-ordinate and cooperate with the task force for the implementation of the Law on Enterprise (LOE) in submitting to the Government in the first quarter of 2004 proposed amendments of Decree No.63/ ND-CP of the Government dated 24 October 1996 making detailed provisions on intellectual property in order to replace the issuance of Intellectual Property Representative Certificates with business conditions without a licence and bolster the registration and protection of intellectual property in Vietnam..."</p>

PROPOSAL NO. 4

The BDS Legal Environment Study states that:

“... the conditions for a vocational training school establishment are too difficult, the procedures and conditions for the establishment are not clear and criteria for the establishment are too high. Regulations and legal documents governing vocational training schools and centres are vague and contradictory... Those, together with other problems, are limiting the entry into market of training service providers, especially those of the private sector....”

Problems Identified in the BDS Legal Environment Study and Included in the LOE Implementation Report	Proposals made for Changes in the Legal Environment in Favour of the Development of BDS Market	Actions Taken by the Government
<p>“...For some select business sectors, it is very difficult or even impossible for entrepreneurs to register or expand their businesses simply because of the lack of guidelines on business conditions. [...] In some cases, business conditions are non-transparent, inaccurate, or simply too high. [...]. In summary, the principle of “citizens are allowed to do business on whatever sectors not prohibited by law” has not been fully observed...”.</p> <p><i>(Report on 3 Year of Implementing the LOE, CIEM/ LOE Implementation Taskforce/MPI, Oct. 2003, page 16).</i></p>	<p>“...The Ministry of Labour, War Invalids and Social Affairs should cooperate with MPI to review legal requirements and regulations for the establishment, organization of vocational training schools, centres in a way that simplifies establishment procedures, diversifies training modalities and gives more autonomy to vocational training centres, and encourages the participation of the private sector (individual, enterprises) in providing vocational training services based on market needs...”</p> <p><i>(Report on 3 Year of Implementing the LOE, CIEM/LOE Implementation Taskforce/MPI, Oct. 2003, page 37).</i></p>	<p>In Directive No.27/ 2003/CT-Ttg, issued 11 December 2003, the Prime Minister requests that:</p> <p>“...The Ministry of Labour, War Invalids and Social Affairs [shall]:</p> <p>Review and assess current regulations and policies relating to the establishment, management and promotion of vocational training schools; submit to the Prime Minister in the second quarter of 2004 [a revised] regulation with emphasis on simplifying procedures for establishment, diversifying sizes and modes of training, raising the autonomy of vocational training schools in respect of their curricular and training quality; encouraging organisations, individuals and enterprises to engage in vocational training of employees in response to market needs...”</p>

The Directive is to be implemented by different ministries and government agencies.

Apart from these sizeable impacts, the process has tested successfully the cooperation mechanism between GTZ and local advocacy and policy making institutions, paving the way for future GTZ support providing advice on SME policy, business enabling environment and investment climate.

IV. NEXT STEPS BY THE GTZ SME PROMOTION PROJECT

1. Follow-up the implementation of the actions requested by the Prime Minister in his Directive. Provide support to key players (CIEM/LOE Implementation Taskforce, VCCI, professional business associations, and related ministries) in the implementation of the actions requested by the Prime Minister.
2. Further disseminate the results and findings of the study through workshops, domestic business fora, press campaign for the purpose of awareness raising.
3. Support other initiatives by local stakeholders for similar proposals for change.
4. Document the lessons learnt.

V. KEY LESSONS LEARNT

- Involvement of the agency which is in charge of providing direct inputs into the policy making process is critically important.
- Strong ownership (through the participation in the implementation and in selection of the study subjects) of local stakeholders and “change agents” is the key to success.
- There is no need to wait for the study to be finalized until policy advocacy activities can be carried out. Key findings on bottlenecks identified while the study is ongoing can be used straight away by the law/ regulation making bodies as long as these results prove good and reliable.
- Direct awareness raising to individuals who really draft the laws/ regulations (through participation in the study even through paid consultancy contracts, supports to their participation in workshops....) really makes sense and can bring about good results.
- A public/ private/ chamber partnership in the study can be a model.

GTZ SME Promotion Project, Le Duy Binh