



Work Package 6 “Legislation”

# THE LEGAL FRAMEWORK OF PROTECTED AREAS IN THE ALPINE STATES

Germany

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## 1 GENERAL POINTS

### 1.1 Organisation of the State

The German state is a federal one. It is divided into 16 individual states/regions (*Länder*). According to the Article 20, paragraph 1, of the Basic Law for the Federal Republic of Germany (*Grundgesetz*, GG), „ [the] Federal Republic of Germany is a democratic and social federal state”.

### 1.2 The legislative and executive

#### 1.2.1 The legislative

Germany has a bicameral parliament. The two chambers are the Bundestag (Federal Diet or lower house) and the *Bundesrat* (Federal Council or upper house). Both chambers can initiate legislation, and most bills must be approved by both chambers, as well as the executive branch, before becoming law.

#### 1.2.2 The executive

There is a federal government for the whole of Germany, as well as governments for the individual *Länder*. Executive powers are primarily a matter of the Land governments, although certain executive competences are given exclusively to the federal governments, e.g. relations with foreign country and the armed forces. Most federal legislation is, however administered by the Land governments. The federal government can usually control this by issuing general directions, or applying the *Bundesrat* when a *Land* government is not complying the Law. Sometimes the federal government will use the Land authorities as agents, e.g. in respect of motorways and federal roads.

### 1.3 Status of International Treaties and European Community Law

#### 1.3.1 International Law

Article 25 of the Basic Law provides that „[the] general rules of international law are an element of federal law. They take precedence over statutes and produce rights and duties directly for the inhabitants of the territory of the Federation”.

#### 1.3.2 European Law

For all Member States: obligation on administrations and national courts to apply Community law in full within their sphere of competence and to protect the rights conferred on citizens by that law (**direct application of Community law**), and to display any conflicting national provision, whether prior or subsequent to the Community provision (**primacy of Community law over national law**).

A new article 23 was introduced into the Basic Law in 1992 to deal with the status of the European Community Law. This article goes on to provide for consultation with the *Bundestag*; and participation by the *Bundesrat* in so far as matters involving the *Länder* are concerned. In the Solange II case 1986, the Federal Constitutional Court stated that the fundamental rights were sufficiently protected by the European Court of Justice, as long as this was so, there was no need for EC law to be reviewed in the light of the German Constitution.

## 2 NATURE PROTECTION AND SPATIAL PLANNING

### 2.1 The preservation of mountain areas and the law

There is no specific regulations/law for the protection of mountain areas. As far as the Alpine territory is concerned, the Alpine Convention entered into force in March 1995 in Germany and all the protocols in December 2002. These international treaties aim at the preservation and the sustainable development of the Alps<sup>1</sup>.

### 2.2 The distribution of power and legislative competencies<sup>2</sup>

The legislative competences of the Federation (*Bund*) and the *Länder* are clearly laid down in Articles 70-78 of the Basic Law, and within these areas the law made by the competent legislature will prevail. Moreover the article 31 of the Basic Law provides that the „ [federal] law has priority over Land law”. The distribution of power and legislative competencies between the Federation and the *Länder* is subject of constant debate and ongoing constitutional reforms. The *Länder* generally have the right to legislate insofar the basic constitutional Law does not confer legislative power to Federation (*Grundgesetz*, article 70, paragraph 1). The Basic Constitutional Law specifies a number of policy fields in which the Federation either has exclusive legislative power or in which the Federation and the *Länder* share legislative power (concurrent legislation) (*Grundgesetz*, articles 70, paragraph 2, 73 and 74).

Both nature protection and spatial planning are cases of concurrent legislation of the Federation and the *Länder* (*Grundgesetz*, article 74, paragraph 1, subpara. 29 and 31). This means that the *Länder* have the power to legislate as long as and to the extent the Federation has not exercised its legislative power by enacting a law (*Grundgesetz*, article 72, paragraph 1). Yet spatial planning and nature conservation represent two of only six policy fields in a result of the last amendment of the Basic constitutional Law on 2006 (*Föderalismusreform*), the *Länder* have been granted the right to enact individuals laws which deviate from federal legislation (*Grundgesetz*, article 72, paragraph 3, subpara. 2 and 4). In the field of nature conservation, however, they may only enact laws after the

<sup>1</sup> Bayerisches Staatsministerium für Umwelt, Gesundheit und Verbraucherschutz und Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit, *Die Alpenkonvention. Leitfaden für ihre Anwendung. Rahmenbedingungen, Leitlinien und Vorschläge für die Praxis zur rechtlichen Umsetzung der Alpenkonvention und ihrer Durchführungsprotokolle*, Munich, October 2007, 41 pages.

<sup>2</sup> LEIBENATH Marcus, Country Study Germany, SPEN- Interactions between Policy Concerning Spatial Planning and Ecological Networks in Europe, ENCN, September 2008.

Federation has amended the nature conservation act or, if the Federation fails to do so, only from 1 January 2010 on (*Grundgesetz*, article 125b, paragraph 1).

## 2.3 The Legal Framework of Nature Protection

The Federal Law on Nature protection is an outline law (*Rahmengesetz*): each *Land* adopts its own law on nature protection. There are 16 regional laws on nature besides the Federal Law on nature protection. In Bavaria, the Law on nature protection is: „*Gesetz über den Schutz der Natur, die Pflege der Landschaft und die Erholung in der freien Natur*“<sup>3</sup>. As we see before, according to the Reform of the Federalism of 2006, the outline law will cease to exist for nature conservation in January 2010. Then we will have only concurrent laws on the federal and state level.

## 2.4 The Legal Framework of Spatial Planning<sup>4</sup>

### 2.4.1 Federal level

There is a federal spatial planning act, the *Raumordnungsgesetz* which defines the principles of spatial planning- It is a framework for the respective *Länder* laws. The federal spatial planning act defines two types of spatial plans:

- the *Länder* are obliged to set up states development plans, i.e. comprehensive plans for their entire territories
- larger *Länder* which include several places of highest order -i.e. several big cities- are obliged to establish regional plans. These have to be derived from the states development plans (*Raumordnungsgesetz*, Articles 8 and 9).

Spatial plans are supposed to specify principles of spatial development for the respective territory and for a medium-term period. In particular they have to include specifications on the desired settlement structure (e.g. spatial categories, central places and development axes), the desired open place structure (e.g. green belts) and on sites for large infrastructure.

We have also to mention that the **Paragraph 16 of the Federal Law on spatial planning** („*Grenzüberschreitende Abstimmung von raumbedeutsamen Planungen und Maßnahmen*“) foresees the transborder cooperation with the transborder States concerning the plans and the measures which could have an impact on the other States:

„*Raumbedeutsame Planungen und Maßnahmen, die erhebliche Auswirkungen auf Nachbarstaaten haben können, sind mit den betroffenen Nachbarstaaten nach den Grundsätzen der Gegenseitigkeit und Gleichwertigkeit abzustimmen*“. This provision obliges also the *Land* to cooperate with the transborder States“.

<sup>3</sup> Gesetz über den Schutz der Natur, die Pflege der Landschaft und die Erholung in der freien Natur (Bayerisches Naturschutzgesetz - BayNatSchG) in der Fassung der Bekanntmachung vom 23. Dezember 2005, Fundstelle: GVBl 2006, S. 2.

<sup>4</sup> LEIBENATH Marcus, Country Study Germany, SPEN- Interactions between Policy Concerning Spatial Planning and Ecological Networks in Europe, ENCN, September 2008.

## 2.4.2 Regional level

At the federal level the Federal spatial planning act is in force in combination with spatial planning acts of the individual *Länder*. For the *Land* Bayern, the law is the *Bayerisches Landesplanungsgesetz (BayLplG)*<sup>5</sup>. A distinction has to be made between the state planning (*Landesplanung*) and the regional planning (*Regionalplanung*).

## 2.5 The protected areas in the legislation on Nature protection

According to the Paragraph 22 of the Federal Law in Nature Protection, the *Länder* designate the protected areas: „*The Länder designate the part of nature and landscapes which have to be declared as Naturschutzgebiet, Nationalpark, Biosphärenreservat, Landschaftsschutzgebiet, Naturpark oder Naturdenkmal oder geschützten Landschaftsbestandteil*“.

Tab. 1: Categories of protected areas in the Federal and Bavarian Laws on Nature Protection

Federal Law on Nature Protection (BNatSchG)	Bavarian Law on Nature Protection (BayNatSchG)
National park ( <i>Nationalpark</i> ) (§24)	Nationalpark (Art. 8)
Nature protection area ( <i>Naturschutzgebiet</i> ) (§23)	Naturschutzgebiet (Art. 7)
Natural monument ( <i>Naturdenkmal</i> ) (§28)	Naturdenkmal (Art. 9)
Protected landscape ( <i>Landschaftsschutzgebiet</i> ) (§26)	Landschaftsschutzgebiet (Art. 10)
Natural park ( <i>Naturpark</i> ) (§27)	Naturpark (Art. 11)
Protected parts of landscape ( <i>Geschützte Landschaftsbestandteile</i> ) (§29)	Landschaftsbestandteile und Grünbestände (Art. 12)
Protected biotope ( <i>Gesetzlich geschütztes Biotop</i> ) (§30)	Gesetzlich geschützte Biotope (Art.13d)
Natura 2000 areas ( <i>Gebiete von gemeinschaftlicher Bedeutung und europäische Vogelschutzgebiete</i> ) (§32)	Gebiete von gemeinschaftlicher Bedeutung und Europäische Vogelschutzgebiete (Art. 13b)
Biosphere reserve ( <i>Biosphärenreservat</i> ) (§ 25)	Biosphärenreservat (Art.3a)
Schutz von Gewässern und Uferzonen (§31)	Gesetzlich geschützte Biotope (Art.13d)

## 2.6 The legal provisions as regards ecological connectivity

### 2.6.1 European Law (the provisions of the Habitats directive)<sup>6</sup>

The Habitats Directive<sup>7</sup> intends to create an ecological network through Europe. The provisions of the article 10 of this directive contain measures for improving the ecological coherence of the ecological network. This disposition is like a recommendation:

<sup>5</sup> Bayerisches Landesplanungsgesetz (BayLplG) vom 27. Dezember 2004.

<sup>6</sup> For further informations about the implementation of the Habitats Directive in Germany, see the last National report made by Germany according to article 17 of the Habitats Directive.



*„Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora. / Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or the traditional systems for marking field boundaries) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species”.*

According to the Guidance on the maintenance of landscape connectivity features of major importance for wild flora and fauna<sup>8</sup> elaborated at the European level for improving the coherence of the Natura 2000 Network, it is clear from the texts of the Habitats directive that the interpretation of the concept of „coherence” is a key issue affecting the implementation of directives. When considering the ecological coherence of Natura 2000, it is important to note that the completed Natura 2000 network, defined by the Habitats directive as the sum of all areas designated for conservation under the Birds and Habitats directives (Article 3, paragraph 1, of the Habitats directive), is a collection of individual protected sites. In order for these protected sites to actually form an ecologically coherent network then necessary functional connections amongst the sites and their surroundings must be maintained. Therefore management measures may need to go beyond the designated sites’ boundaries and apply to the wider environment.

### 2.6.2 Federal Law

Ecological networks hold a prominent position in German Federal Law on Nature protection: the third article of this Law and the complementary article 5, paragraph 3, have been introduced in 2002. These articles have to be implemented besides the provisions concerning the Habitats directive.

#### **Article 3 of the Federal Law on Nature Protection on Ecological network/Habitats linkage (*Biotopverbund*)<sup>9</sup>.**

Since 2002 there is a legal obligation to create an ecological network (*Biotopverbund*/Habitat linkage) through the whole state and through the *Länder*. This legal obligation is inserted in the paragraph 3 of the federal law (BNatSchG) and in the different laws on nature protection of the German *Länder*. This interstate/interregional habitat linkage shall comprise at least 10% of each *Länder*’s surface. This measure seeks a sustainable preservation of native species and plants, their biospheres and communities, as well as preservation, restitution and development of functioning ecological interaction. By that the fragmentation and isolation of biotopes shall be reduced and an exchange between natural entities and genera be facilitated. Despite being a new instrument, the habitat

<sup>7</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 59, 8.3.1996, p. 63.

<sup>8</sup> KETTUNEN Marianne, TERRY Andrew, TUCKER Graham and JONES Andrew, *Guidance on the maintenance of landscape connectivity features of major importance for wild flora and fauna. Guidance on the implementation of Article 3 of the Birds Directive(79/409/EEC) and Article 10 of the Habitats Directive (92/43/EEC)*, Institute for European Environmental Policy, August 2007.

<sup>9</sup> Online on URL: [http://www.naturschutzrecht.net/Gesetze/Bund/English/BNatSchG\\_Eng\\_Intro.htm](http://www.naturschutzrecht.net/Gesetze/Bund/English/BNatSchG_Eng_Intro.htm). (19 November 2008).



linkage shall be achieved via the already existing means of nature protection. Part of this network may be national parks, FFH areas, protected zones, biotopes in a statutory protection, sanctuaries or parts of the respective sites as well as further areas and elements, provided they qualify from the perspective of biological science for habitat linkage. In order to warrant a sustainable habitat linkage, all involved areas have to be secured legally to that end. That may be achieved through designation as protected areas, through landscape planning, long-term schemes for contract-based nature protection or other appropriate measures.

#### **Article 5 (3) of the Federal Law on nature protection (*Agriculture, forestry and fishery*)**

By contrast to the article 3, the article 5, paragraph 3, of the Federal Law on Nature Protection is not targeted as a comprehensive network, but a compensating for barriers which result from farming activities. It aims at defining minimum standards for good practice farming. Those parts of the country that are used for agriculture shall be ecologically upgraded.

#### **2.6.3 Bavarian Law on Nature Protection:**

The Federal provisions of the article 3 of the Federal Law on Nature Protection are integrated in the article 13f of the Bavarian Law on Nature Protection. In Bavaria, there are currently 350 projects relating to the *Biotopverbund* (some are not begun while others are already in application). Bayern does not dispose of an ecological network concept at state level. The local initiatives in Bavaria for the implementation of the provisions as regards the ecological network (*Biotopverbund*) are called „BayernNetz Natur“- *Bayerns landesweiter Biotopverbund*.

## **2.7 The ecological connectivity in non legally-binding documents**

### **2.7.1 National level**

- National Strategy on Biological Diversity (2007)<sup>10</sup>
- Recommendations on the implementation of article 3 of the German Law on Nature Protection
- Publications by the Federal Agency for Nature Conservation (BfN) on the result of scientific studies the BfN had contracted.

### **2.7.2 Regional level**

Bavarian Strategy on Biological Diversity was adopted the 1<sup>st</sup> April 2008 and is also partly about the ecological connectivity. For instance, according to the second objective about the preservation of habitats, the ecological network (*Biotopverbund*) has to be completed and durable protected until 2020.

<sup>10</sup> Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, *National Strategy on Biological Diversity*, October 2007, 180 pages.

## 2.8 Pilot areas in the ECONNECT project

The National Park Berchtesgaden, partner and part of one pilot region (see figure 1) in the ECONNECT project.

The Berchtesgaden National Park is located in southeast Germany in the Free State of Bavaria and borders on the Austrian state of Salzburg. The park was founded in 1978 and, covering a surface of 210 km<sup>2</sup> or 81 sq. miles, it is state property in its entirety. Its high mountain landscapes are characterized by extensive forests and steep rock faces<sup>11</sup>.

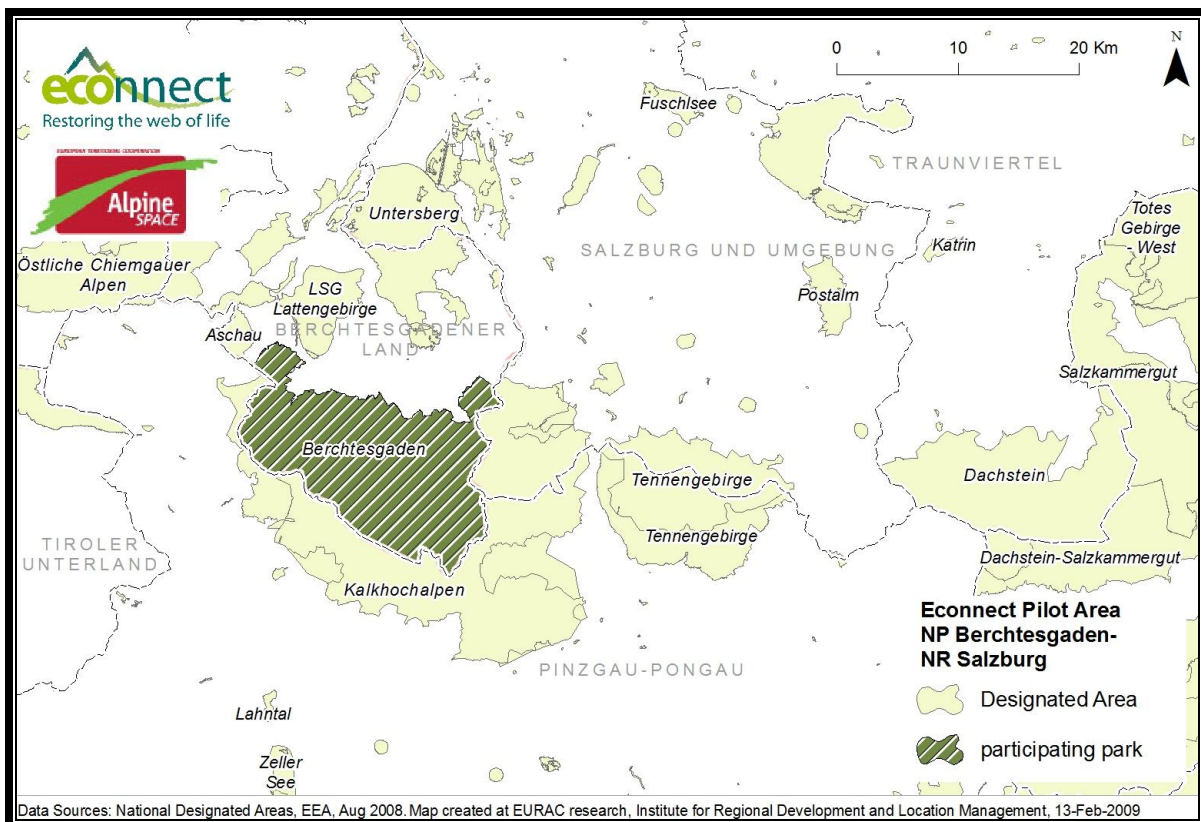


Fig 1: The transboundary area Berchtesgaden - Salzburg.

### The transboundary area Berchtesgaden - Salzburg<sup>12</sup>: pilot region in the ECONNECT project

The pilot region Berchtesgaden/Salzburg lies along the Austrian-German border and comprises parts of the Free State of Bavaria (Germany) as well as the „Bundesland“ Salzburg (Austria). Several great protective areas are situated in this region: the national park und biosphere reserve Berchtesgaden as well as the nature reserve in the „eastern Alps of Chiemgau“, the natural park Weißbach, the

<sup>11</sup> Abstract of the Internet Web Site of the National Park Berchtesgaden (online on url: [www.nationalpark-berchtesgaden.bayern.de/publikationen/fremdspracheneng/index.htm](http://www.nationalpark-berchtesgaden.bayern.de/publikationen/fremdspracheneng/index.htm) ( 4 March 2008).

<sup>12</sup> Quote: Task Force Protected Areas, Permanent Secretariat of the Alpine Convention.

nature reserves „Kalkhochalpen“ and „Tennengebirge“. Several cooperative projects already exist in this region and on their basis further cooperation can be established (e.g. data exchange, collective research, etc.). Due to the region being ecologically highly important and part of one biogeographical area, further cooperation towards interlinked biotopes is important. The management of protected areas (National parks)

### The Management of National Parks

The main legal provisions concerning the National Park Berchtesgaden and its management are the following:

- Federal Law on nature protection (Bundesnaturschutzgesetz)
- Bavarian Law on nature protection (Bayerisches Naturschutzgesetz)
- National park ordinance (Nationalparkverordnung)
- National park plan (Nationalparkplan)

The provisions of the first subparagraph of the paragraph 24 of the Federal Law on Nature protection define the objectives of the National parks. There are no provisions concerning the management of the National Parks on the federal level: the provisions concerning the management of the national parks are adopted on the regional level. The provisions concerning the regulation in protected areas can also be found on the regional level or are subject of specific regulations (for the National Parks, see the article 8 of the Bavarian Law on Nature Protection).

## 2.9 The existing transborder cooperation as regards protected areas

There is no legal obligation to cooperate with transborder protected areas in the legal provisions on nature protection. A voluntary cooperation already exists between Austria and Germany. This cooperation appears through working groups or also through the European INTERREG Programms.

## 3 TRANSBORDER COOPERATION

### 3.1 The powers of the German *Länder* as regards transborder cooperation

As regards transborder cooperation, constitutional provisions can be found in the Basic Law of Germany and also in the Bavarian Constitution.

#### Preamble of the Basic Law:

*„Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law“.*

#### Article 32 of the Basic Law:

*„ (1) Relations with foreign states shall be conducted by the Federation. / (2) Before the conclusion of a treaty affecting the special circumstances of a Land, that Land shall be consulted in timely*

*fashion. / (3) Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government*".

**Article 28, paragraph 2, of the Basic Law:**

*„Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws”.*

**Article 24, paragraph 1, and letter a) of the Basic Law:**

*„Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions”.*

**Article 3a of the Bavarian Constitution:**

According to this article (*Bekanntnis zu geeintem Europa*), the Land Bavaria has to cooperate with the others European regions (*„Bayern arbeitet mit anderen europäischen Regionen zusammen”*).

The territorial entities are not subject of the international law (*„keine Völkerrechtssubjekte”*) and it was several times highlighted by the Constitutional Court of Germany (*Bundesverfassungsgericht*).

### **3.2 Germany and the International Law on Transborder Cooperation**

Germany has ratified the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities. This Convention was drawn up within the Council of Europe by the Committee on Co-operation in Municipal and Regional Matters and adopted by the Committee of Ministers, was opened for signature by the member States of the Council of Europe on 21 May 1980.

Germany ratified also the two additional Protocols to the Outline Convention:

- the Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities. Germany ratified this text in September 1998 and it entered into force in December 1998 in Germany.
- the Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial co-operation. Germany ratified this text in October 2001 and it entered into force in January 2002 in Germany.

### **3.3 The existing transborder cooperation between the Land Bayern and the others alpine regions (*„die regionale Zusammenarbeit”*)**

Bavaria is as a strong autonomous Province (*Land*) since a long time working for cooperation with comparable local entities which are facing to common problematics. With connected multilateral working groups from other regions (parts of states/cantons). Bavaria sees a good possibility of treating common problems and requests for instance in the alpine or in the Bodensee- area with a minimum of institutionalisation and can easier make proposals for solution. The working group Arge Alp was created in 1972 und was through Europe an example for the cooperation between regions.

### 3.4 The European Grouping of Territorial Cooperation (EGTC) in law

In Germany, the Bund considers the rules implemented by having nominated the component authorities for all *Länder* (regions). According to the authorities, the federal and/or regional laws contain already the necessary regulations for the implementation of the EGCT. No special provisions are foreseen for questions relating to the limitation of liability, registration/publication and task delimitation. But if necessary, further regulations could be adopted for the practical implementation of the regulation on EGTC. For the Land Bavaria the component authority is the “*Regierung der Oberpfalz*” and for the Land Baden Württemberg it is the “*Regierungspräsidium Freiburg*”. In Bavaria, this possibility is underlined in the **article 13 of the Bavarian Law on the competencies for the execution of economic regulations** (*Gesetzes über die Zuständigkeiten zum Vollzug wirtschaftsrechtlicher Vorschriften-ZustWiG*<sup>13</sup>):

*„[...] Zuständig für den Vollzug der Verordnung (EG) Nr. 1082/2006 des Europäischen Parlaments und des Rates vom 5. Juli 2006 über den Europäischen Verbund für territoriale Zusammenarbeit - EVTZ - (ABl EU Nr. L 210 S. 19) ist die Regierung der Oberpfalz. Das Staatsministerium für Wirtschaft, Infrastruktur, Verkehr und Technologie wird ermächtigt, das Nähere zur Anwendung dieser Verordnung durch Rechtsverordnung zu regeln“.*

=An ordinance could be adopted by the Bavarian Ministry on Economy, Infrastructure, Transport and Technology in order to clarify the modalities for the implementation of the regulation.

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<sup>13</sup> Gesetz über die Zuständigkeiten zum Vollzug wirtschaftsrechtlicher Vorschriften (ZustWiG) in der Fassung der Bekanntmachung vom 24. Januar 2005 (GVBl S. 17, BayRS 700-2-W), zuletzt geändert durch § 1 des Gesetzes vom 20. Dezember 2007 (GVBl S. 964).



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