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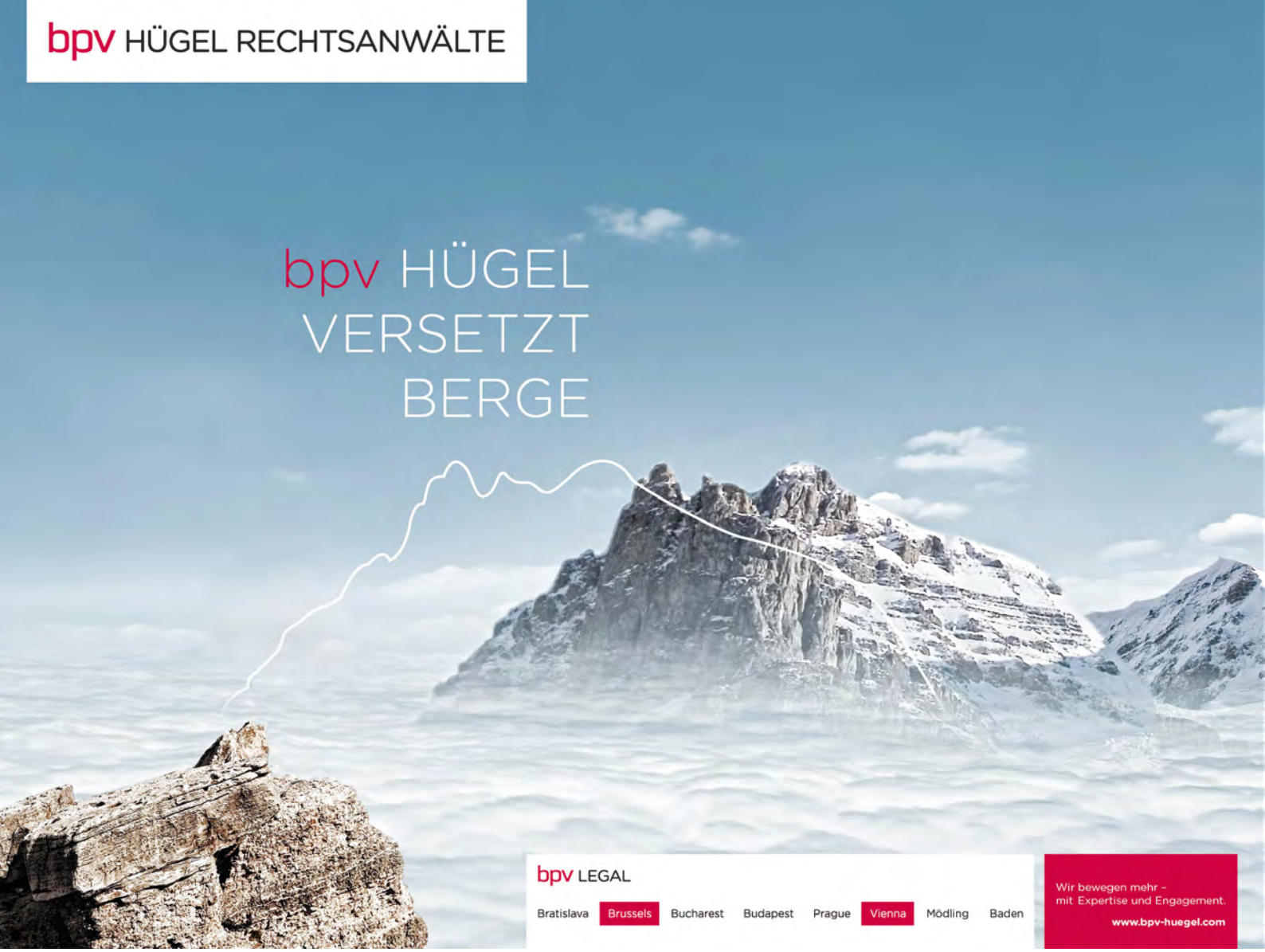

NEWSLETTER

COMPETITION LAW AMENDMENT 2017

1 MAY 2017

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Competition law amendment 2017 in force

On 1 May 2017, significant changes to Austrian competition law enter into force by means of the Cartel and Competition Law Amendment Act 2017 (Kartell- und Wettbewerbsrechts-änderungsgesetz 2017, **„KaWeRÄG 2017" / „Amendment")**[1].
The Amendment's **key elements** as well as a short update on **other recent developments,** such as the extension of the criminal law provision on leniency in the Criminal Procedure Act (StPO) and the partly controversial proposal for a Directive by the European Commission to increase the powers of national competition authorities, can be found in this newsletter.

The Amendment's key elements are:

- Facilitating the **enforcement of private damages claims** following on from competition law infringements (via implementation of the EU Cartel Damages Directive 2014/104/EU, **„Damages Directive"**), including new - rules on statutory limitation periods which deviate from general Austrian tort law,
- Introduction of a **transaction value-based notification threshold** in the area of **merger control,**
- **Exemption from the cartel prohibition** for agreements between **publishers and press wholesalers,**
- New **limitation periods** in the area of **public antitrust enforcement,**
- Introduction of a new **ground for appeal based on errors of fact,**
- **Strengthening of the Federal Competition Authority's („FCA")** powers with regard to access to electronic data in the context of dawn raids,
- **Increasing transparency** through stricter publication obligations regarding decisions and a duty to include reasoning in settlement decisions.

In addition, the application of the leniency rules contained in the Criminal Procedure Act has been extended to 2021 by the Criminal Procedure Amendment Act II 2016 (Strafprozessrechtsänderungsgesetz II 2016)[2]. These rules contain an interface in the leniency program under competition law.

At the end of March 2017, the European Commission has also tabled a proposal for a Directive on harmonising the powers of competition authorities in the EU. This could have significant implications also for the Austrian antitrust enforcement system.

[1] Federal Law Gazette I No 56/2017. The changes concern the two most important legal instruments in Austrian competition practice, i.e., the Cartel Act (Kartellgesetz, KartG) and the Competition Act (Wettbewerbsgesetz, WettbG).

[2] Federal Law Gazette I No 121/2016.

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Facilitating private damages actions in cartel cases

The core element of the Amendment 2017 is – with the aim of facilitating private damages actions – the implementation of the Damages Directive. Some of the Directive's provisions had already been implemented in Austria through the 2013 competition law amendment, such as, in particular, the binding effect of decisions by competition authorities on courts hearing a private damages case. In principle, the new rules apply to damages following on from competition law infringements which have occurred after 26 December 2016.

From the point of view of potentially affected parties (claimants and defendants) the following points will change in particular:

Right to compensation and introduction of a presumption of harm

The Cartel Act contains an explicit rule on the right to claim compensation for damages caused by antitrust infringements already since the 2013 amendment. The implementation of the Damages Directive significantly complements this basic rule: From now on there will be a (rebuttable) presumption that **"cartels between competitors"** cause harm. This **presumption of harm** significantly helps the claimant's position, because it results in a shift of the burden of proof towards the defendant.

Joint and several liability and privileged status of immunity recipients

Several undertakings participating in a competition law infringement are **jointly and severally liable for the damage vis-à-vis the injured party.**

An immunity recipient, i.e., an undertaking which is granted immunity from fines by the competition authority in return for its cooperation and disclosure of secret cartel, enjoys a privileged position in this regard. In principle, immunity recipients are liable only to their direct and indirect purchasers or suppliers. This aims to safeguard leniency programmes, which are an important tool in public antitrust enforcement. The privileged position of immunity recipients, however, is not absolute: If an injured party cannot receive (full) compensation for the inflicted harm from the other infringers, the immunity recipient remains jointly and severally liable.

Rules on evidence in connection with the passing-on of the damage

In implementing the Damages Directive, the Amendment contains rules on evidence for cases where the damage is "passed on". Under certain circumstances there is a rebuttable **presumption** that a damage caused by a competition law infringement has been passed on to the next level in the supply chain. Via a "third party notice" ("Streitverkündung") the defendant can – depending on the circumstances – involve its direct or indirect purchasers (or suppliers) in the damages proceedings

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Longer limitation periods for damages claims following on from competition law infringements

In connection with damages claims following on from competition law infringements limitation periods different from general tort law apply. The limitation period is **five years,** not three years, and does not start until the infringement has ended. However, an absolute limitation period of **ten years from the occurrence of the damage** applies.

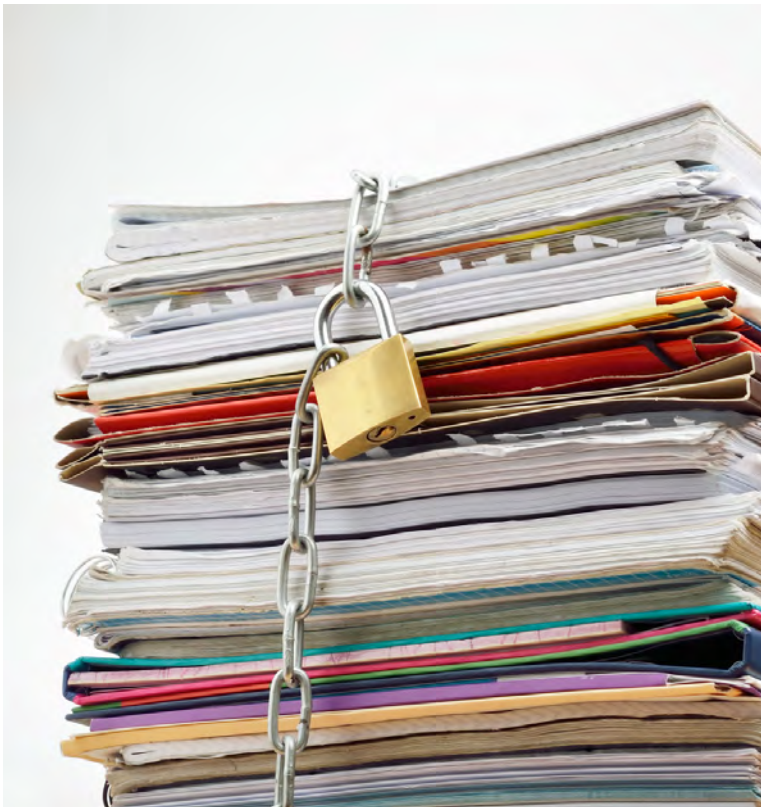
The limitation period is suspended as long as proceedings before a competition authority are pending and during an investigative measure carried out by a competition authority (the EU Commission and competition authorities in other EU Member States!).

Far-reaching rules on the disclosure of evidence

The most far-reaching change in connection with the implementation of the Damages Directive from the perspective of both potential claimants and infringers concern new rules on the disclosure of evidence in damages proceedings. Such rules have so far been unknown in Austrian law. A court hearing a damages case may in the future, on the basis of a reasoned request and **after balancing the various interests,** oblige the opposing party or a third party to **disclose evidence** (under certain conditions the disclosure may also cover evidence from files of courts and other authorities) (in practice such disclosure requests will mostly concern documents which prove a competition law infringement and the damage inflicted).

To the extent that **documents in files of a competition authority** are concerned, the balancing of interests to be carried out by the court also has to take into account the effectiveness of public competition law enforcement. In addition, **leniency statements and settlement submissions are protected from disclosure,** while certain other documents, such as withdrawn settlement submissions, may be disclosed only after the proceedings before the competition authority have been closed. However, the protection from disclosure does not cover documents which are part of a competition authority's file independently of any proceedings, e.g., emails from the cartel period which prove the infringement.

NB: Under the Austrian leniency program, immunity is available also in **vertical cases** (e.g., with regard to retail price maintenance). Given that the rules on evidence disclosure are based on a more restrictive definition of the term „immunity recipient", the question arises whether leniency statements and settlement submissions in vertical cases enjoy protection from disclosure.



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Broadening the reach of Austrian merger control by introducing a transaction value-based notification threshold

In introducing a new notification threshold, Austrian merger control for the first time also takes into consideration the **transaction value,** not only the parties' turnover.

The new threshold applies to **transactions** which are implemented **after 1 November 2017** and aims to cover in particular **acquisitions of companies in the digital arena** where the target's turnover may be low but its value is high. According to this new notification threshold, which comes in addition to the existing turnover thresholds[3], a concentration will also have to be notified to the FCA if

- the combined **worldwide** turnover of the undertakings concerned exceeds **EUR 300 Mio,**
- the combined **Austrian** turnover of the undertakings exceeds **EUR 15 Mio,**
- the **value of the consideration** for the transaction exceeds **EUR 200 Mio,** and
- the target is active in Austria **to a significant extent.**

Value of the consideration

The law does not define the term „consideration"[4].

Significant domestic activity

The law does not explain when the target is active on the domestic market „to a significant extent". According to the explanatory notes this is the case, in particular, where the target company has **business presence in Austria. If there is no** such presence, the explanatory notes state that regard must be had to **„recognised key measures used in the respective industry".** As far as the digital economy is concerned, the explanatory notes mention user numbers and website visits in this context. With regard to the pharmaceutical industry, which is equally relevant in this regard, or start-ups in other industries are concerned, no guidance for the assessment of the local nexus is provided.

For media undertakings, which are often active in the digital arena, it is interesting to note that the special provision for turnover calculation in cases of so-called „media mergers", namely the application of a **multiplying factor** (20 times or 200 times the turnover), does **not** apply in the context of the new notification threshold in Section 9 para 4 Cartel Act.

For merging parties it may therefore be difficult to assess with certainty whether the relevant merger is subject to Austrian merger control. In particular with regard to **multijurisdictional filings** one has to bear in mind in the future that not only the respective turnover figures, but also the transaction value has to be taken into account (in Germany, the 9th amendment to the Act Against Restrictions of Competition includes a similar provision based on the transaction value (in this case of EUR 400 million)). If a reportable merger is not notified, fines of up to 10% of the group turnover of the last business year may be imposed.

The Amendment also increases the amount of the **notification fee** from EUR 1,500 to EUR 3,500 with immediate effect.

[3] To date, mergers need to be notified in Austria if the combined worldwide turnover of the undertakings concerned exceeded EUR 300 million, if the combined Austrian turnover of the undertakings concerned exceeded EUR 30 million, and if the worldwide turnover of each of at least two of the undertakings concerned exceeded EUR 5 million (unless only one undertaking achieves a turnover in Austria of more than EUR 5 million, and the other undertakings concerned achieve a combined worldwide turnover of less than EUR 30 million). In so-called "media mergers" the turnover of the parties have to be multiplied with a certain factor, so that the turnover thresholds in this area are de facto reduced.

[4] The explanatory notes state that the term "consideration" covers the purchase price as well as any other compensation such as asset deals and liabilities assumed by the purchaser.

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Exemption from the cartel prohibition for agreements between publishers and press wholesalers

Agreements between publishers and so-called "press wholesalers", i.e., undertakings who purchase newspapers and magazines with a right to return ("Remissionsrecht") and sell them on to retailers (again with a right to return), are from now on **exempted** from the prohibition of anticompetitive agreements (cartel prohibition) provided that the respective agreement is necessary for the nationwide and non-discriminatory distribution of newspapers and magazines. The exemption only applies within Austrian antitrust law. If the trade between Member States is affected (and if, consequently, EU antitrust law applies), the cartel prohibition of Article 101 TFEU continues to be relevant.

The assessment of these requirements and the merely national scope may be difficult in practice. It is for the undertakings themselves to assess the criteria.

Procedural changes

Possibility to sanction competition law infringements extended

Until now, a fine for competition law infringements can only be imposed in Austria if the FCA submits a fining application to the Cartel Court within five years after the cessation of the infringement. Pursuant to the new provisions, **every act of investigation or enforcement by the FCA interrupts the limitation period.** It suffices that the relevant act is notified to one of the undertakings participating in the infringement. With every interruption the limitation period starts running anew. However, there is an absolute limitation period of **ten years after the infringement has ceased.**

Hence, infringements which have ceased on 30 April 2012 and in respect of which no fining application was submitted to the Cartel Court, are time-barred. If an infringement did not cease until 30 April 2012 and on 1 May 2017 an act of investigation or enforcement is notified to one of the undertakings participating in the infringement, the limitation period is interrupted.

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Improved legal protection in cartel proceedings

While errors of fact by the Cartel Court could so far be challenged within very tight limits or, due to very strict case law, in fact not be challenged at all, an appeal to the Supreme Court in its capacity Supreme Cartel Court may, following the Amendment, also be based on the ground that, according to the case files, there is substantial doubt as to the correctness of the facts underlying the Cartel Court's decision.

Improvement of the competencies of the FCA in connection with access to electronic data

In connection with dawn raids, the Amendment clarifies that the FCA can inspect documents and data which are **accessible from the undertaking affected by the search,** – irrespective of the place of storage (location of the server).

The FCA has the power to enforce access to electronic data also by means of periodic **penalty payments** (in the amount of 5% of the average daily turnover in the last business year for every day of delay). The penalty payment has to be requested at and imposed by the Cartel Court.

The Amendment also enables the FCA to set up an **internet-based (anonymised) whistleblower system** in order to discover cartel infringements. A similar system has recently been established by the EU Commission.

Increased transparency in cartel proceedings

The Amendment contains several **measures to improve transparency** in antitrust proceedings:

- Now also **Cartel Court decisions rejecting or dismissing applications** have to be **published** in the relevant database run by the Ministry of Justice("Ediktsdatei"; so far this was the case only for decisions granting an application, e.g., decisions establishing a competition law infringement).
- In addition to that, the **operative part of final decisions** by the Cartel Court has to be **published** on the FCA's homepage immediately (in leniency cases this publication also has to include the **name of the immunity recipient;** this is to avoid unsuccessful damages actions given the privileged position of immunity recipients with regard to joint and several liability).
- In the **„settlement cases"** (i.e., cases in which the undertaking concerned does not deny the FCA's allegations) the Cartel Court's written decision also has to contain a **reasoning.**
- Moreover, the **FCA** has the **right** to **inform the public about "proceedings of public importance"** – similar to public prosecutors in criminal proceedings.

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CONCLUSION

The core elements of the Amendment are about facilitating the enforcement of private damages claims by means of implementing the EU Cartel Damages Directive. It remains to be seen if this improvement of private antitrust enforcement through damages actions will have repercussions on public antitrust enforcement (in particular in the form of a reduced number of leniency applications). In any event, the Austrian legislator has– to the extent that there was room to manoeuvre at all –attempted to strike a balance between the conflicting interests (private versus public enforcement).

The introduction of a transaction value-based notification threshold in merger control is also highly important in practical terms. This will significantly **extend the scope of Austrian merger control.** Given the vague wording of the relevant provision it can be expected that the new rules will lead to uncertainties in practice.

OTHER RECENT DEVELOPMENTS

The Criminal Procedure Amendment Act II 2016 has modified the **leniency provisions in criminal procedure law (Sections 209a und 209b of the Criminal Procedure Act) and has extended their application by five years,** i.e., until 2021. The amendment clarifies in Section 209b of the Criminal Procedure Act, which is an interface between the leniency program in competition law and criminal law[5], that it is irrelevant for the application of this provision whether an application for immunity from fines or for a fine reduction was filed.

Apart from that, particularly for the competition law enforcement in Austria it is worth mentioning that the European Commission has submitted a **proposal for a Directive on the empowerment of competition authorities of the Member States when enforcing competition rules[6].** The proposal envisages far-reaching changes which - should they be transposed in this form - could bring about significant changes to competition law enforcement in Austria, although from Austria's point of view no essential deficiency relating to the opportunities to enforce competition law can be spotted.

The proposal suggests that so-called "national administrative competition authorities", for Austria this would be the **Federal Competition Authority, could be given the power to impose interim injunctions and measures.** In this case the Austrian Federal Competition Authority would de facto in all proceedings - insofar as the conditions for the imposition of preliminary injunctions or measures are met - have the opportunity to take an initial decision.

The Austrian enforcement practice would be affected by even more far-reaching changes, for instance, if the extraordinarily detailed harmonized provisions on leniency statements, as provided for in the proposed Directive, were transposed. In particular, the material scope of the Austrian leniency programme would be substantially restricted, since the proposal, contrary to practice in Austria, **does not contain leniency statements in vertical cases** (due to fairly narrowly phrased definitions, whereby a leniency statement only exists in relation to a "secret cartel" defined as competition restricting conduct "between two or more competitors"). A special feature of Austrian competition law, with a currently wide scope of application in practice, would cease to exist.

The proposed Directive is currently in the course of being appraised, we will again report on any developments.

[5] According to this provision the Federal Cartel Prosecutor has to inform the public prosecutor about a leniency application (under competition law) if it would be disproportionate, considering the importance of the leniency application for the discovery of the competition law infringement, to criminally prosecute individual employees who were involved in the infringement. The public prosecutor has to close the criminal proceedings against employees who cooperate in the investigation.
[6] Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final.

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About bpv Hügel

bpv Hügel is a business law firm consulting national and international companies. bpv Hügel is located in Vienna, Brussels and Mödling. Furthermore, the firm is a founding member of bpv legal, an alliance of business law firms operating in Central and Eastern Europe.

A **special focus** of bpv Hügel is **antitrust law and merger control law in offices located in Vienna and Brussels as well as in bpv legal's CEE offices in Prague, Budapest, Bratislava und Bucharest.**

bpv Hügel's specialised attorneys assist their clients with issues regarding national as well as European antitrust law, such as representing and defending before Austrian or European competition authorities and courts, accompanying house searches, supporting leniency applications, developing defence strategies or representing clients in the event of an action for damages.

A further focus of bpv Hügel is on handling merger control proceedings on a national and international level (notifications to the Federal Competition Authority and to the European Commission), as well as on competition law compliance in structuring Joint Ventures, distribution agreements and other forms of cooperation between companies.

The well renowned guide Chambers Europe lists the law firm as **1 of 2 top firms in Tier 1** operating in the aforementioned legal fields in Austria. Moreover, bpv Hügel and the members of the competition team are also top-ranked **(Tier 1 respectively, "Elite")** in "Legal 500", "Juve", "Who is Who" etc.

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