

# PANORAMIC

# LITIGATION FUNDING 2024

Contributing Editors

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Woodsford

**NIVALION**

Elevating legal finance

**LEXOLOGY**

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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# Austria

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# Contributors

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## REGULATION

### Overview

#### 1 | Is third-party litigation funding permitted? Is it commonly used?

Third-party funding is permitted in Austria. The Austrian Supreme Court approved litigation funding by third parties in a 2013 decision (OGH, 27 February 2013, 6 Ob 224/12b) and confirmed on various occasions, most recently in an obiter dictum statement at the end of 2021, that third-party funding is permissible under Austrian law (OGH, 15 December 2021, 18 OCg 5/21s).

Thus, today, litigation funding in Austria is an accepted practice and has been judicially endorsed by the Austrian courts. Although the courts have not comprehensively covered all aspects involved, they have established an unquestioned and favourable environment for third-party litigation funding in Austria.

Compared to other jurisdictions, third-party litigation funding has had a late start in Austria. Recently, it has started to become an established litigation tool, including in insolvency proceedings; but it is still not as commonly used as in other jurisdictions. It is, however, increasing in use in relation to joint consumer actions.

### Restrictions on funding fees

#### 2 | Are there limits on the fees and interest funders can charge?

There is no explicit limit on what is considered an acceptable compensation for a funder's services. However, as a general rule, a third-party funding agreement – as any other agreement under Austrian law – must not violate a legal prohibition or be against bonos mores (ie, it must not constitute profiteering) (section 1 Act against Profiteering [WucherG]; section 879 II No. 4 of the Austrian Civil Code).

The Austrian Supreme Court determined that the prohibition of a *pactum de quota litis* agreement (client promises a remuneration to its lawyer based on a percentage of the damages or sums recovered) does not apply to funders – in contrast to legal supporters (*Rechtsfreund*, including lawyers, notaries public, tax advisers and auditors) – as long as funders do not provide legal advice to the funded party (OGH, 23 February 2021, 4 Ob 180/20d; OGH, 25 March 2021, 2 Ob 10/21s). The court noted in that respect that the funder should also not exert direct influence on the proceedings and that the funded party has to remain the 'master of the proceedings'.

### Specific rules for litigation funding

#### 3 | Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

There are no specific provisions in Austrian legislation.

Lawyers' professional conduct in Austria does not allow for lawyers to be paid only on the basis of contingency fees (prohibition of *quota litis* agreements; section 16 of the Lawyer's Ordinance (RAO) and section 879 II No. 2 of the Austrian Civil Code), so any funding agreement that directly or indirectly results in such a contingency fee model for the involved lawyer violates these provisions.

## Legal advice

- 4 | Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

Lawyers' professional conduct in Austria is regulated in the RAO and the Professional Practice Guidelines (RL-BA). In light of these rules, the lawyer's independence in acting on behalf of the litigant is crucial, and this also applies to cases involving a third-party funder. However, by a clear separation of the roles between the lawyer and the funder, in principle, a lawyer who advises their clients in relation to a funder has no conflict of interest (OGH, 25 March 2021, 2 Ob 10/21s).

## Regulators

- 5 | Do any public bodies have any particular interest in or oversight over third-party litigation funding?

As of the time of writing, neither the Austrian financial regulator nor any other governmental body has any known interest in overseeing litigation funding.

## FUNDERS' RIGHTS

### Choice of counsel

- 6 | May third-party funders insist on their choice of counsel?

Independence in acting on behalf of the litigant is an important principle of the lawyer's professional conduct. In light of the established third-party litigation funding concept, this means that, in general, the litigant's lawyer must be able to act free from any instructions of the third-party funder and only on behalf of the client. However, this does not exclude the funder's right to agree with the litigant that funding is only granted for a specific lawyer accepted by the funder or that, if the litigant intends to replace their lawyer, funding will only be further granted if the new lawyer is accepted by the funder.

### Participation in proceedings

- 7 | May funders attend or participate in hearings and settlement proceedings?

In domestic litigation, court hearings are generally public, and funders can attend without having to obtain specific permission. On the other hand, settlement discussions are often conducted in private. However, if the counterparty does not object, a litigant might even invite their funder to participate in such discussions.

It must be kept in mind that the majority of litigation cases funded by third-party funders in Austria so far have been carried out without disclosing the funder's engagement. As such, the relevance of the funder's permission to attend or participate is limited.

In arbitration, the respective hearings and proceedings are generally private, and funders may participate only if there is no objection by the counterparty.

## Veto of settlements

### 8 | Do funders have veto rights in respect of settlements?

To protect the funder's investment, the funder is often granted information or consultation rights, or a veto clause regarding a potential settlement in the funding agreement. This is, in general, permissible under Austrian law, provided it does not interfere with the independence of the funded party's lawyer, who has a duty to defend the funded party's rights. Moreover, it is common for the funded party and the funder to agree in advance on certain minimum and maximum amounts concerning the funder's veto right and other limitations to accept a particular settlement.

## Termination of funding

### 9 | In what circumstances may a funder terminate funding?

Litigants and funders are free to agree on various events or circumstances that might terminate funding. Usually, such circumstances fall into two categories. On the one hand, there are events that are deemed to have a major effect on the risk of the proceedings, which often include:

- a court or authority decision that results in a full or partial dismissal of the claim;
- the disclosure of previously unknown facts;
- a change in case law that is decisive for the current litigation process;
- a loss of evidence or evidence that is accepted and tends to be negative; and
- a major change in the creditworthiness of the respondent.

In practice, a funder would, under such circumstances, terminate the funding agreement and bear any costs incurred or caused until the termination, as well as costs that occur as a result of the termination.

While these clauses prevent the funder from having to continue funding legal proceedings that appear reasonably unpromising, a second category involves breaches of obligations



by the litigant under the funding agreement. In such cases, the funder can usually terminate the funding after due notice and is not obliged to cover the outstanding costs of the proceedings. On the contrary, given these circumstances, the litigant is usually obliged to reimburse the funder for its costs and expenses.

### Other permitted activities

**10** | In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

In light of the independence of the claimant's lawyer from the third-party litigation funder, a funder is not allowed to instruct the lawyer during the proceedings. The lawyer would violate professional conduct rules (sections 7 and 9 RAO; section 6 RL-BA) if their actions were based on a funder's, rather than their client's, instructions. Therefore, any rights and actions the funder intends to exercise during the course of the litigation have to be agreed with the claimant in the litigation funding agreement. This includes any information rights, access to documents produced during the litigation and any rights to veto the actions a litigant is usually free to take.

Consequently, the litigant is usually obliged to inform and consult the funder prior to concluding or revoking any settlements, waiving any claims, initiating any additional proceedings in connection with the funded claim, adopting any legal remedies, expanding the claim or otherwise disposing of the funded claim. Funders usually do not take an active role during the proceedings but only within the limited framework as provided for in the litigation funding agreement to protect the funder's investment. The involvement of a litigation funder does not have to be disclosed to the court or the counterparty, which also considerably limits the funder's role within the litigation in the majority of the cases.

## CONDITIONAL FEES AND OTHER FUNDING OPTIONS

### Conditional fees

**11** | May litigation lawyers enter into conditional or contingency fee agreements?

The lawyer's professional conduct prohibits fee agreements in which the lawyer's fee entirely depends on the outcome of the case. Hence, pure contingency fee arrangements are not permitted. Only if the lawyer charges a basic fee (flat or on an hourly basis) for the services that cover the actual costs of the lawyer's practice are they allowed to agree on a premium in the event of a successful outcome.

Consequently, the litigation funding agreement must not directly or indirectly provide a model resulting in a conditional or contingency fee for the lawyer. However, it is permissible to add a success fee for the lawyer within the limits described above in the funding agreement.

### Other funding options

**12** | What other funding options are available to litigants?

Legal cost insurance is widely available in Austria. However, the extent and limits of coverage depend upon the specific policy, as this kind of insurance usually only covers the costs of certain types of claims. Further, the insurance policy usually has to be arranged before a person or entity becomes aware of the need to litigate. After-the-event litigation insurance is not common in Austria.

A claimant may also seek legal aid if they lack the financial resources to fund the proceedings and if the case does not seem devoid of any chance of success. However, both conditions are handled rather strictly by Austrian courts. Legal aid can comprise an exemption from the obligation to pay an advance on costs, to pay court costs and to provide security. It can also comprise the appointment of a lawyer by the court if this is necessary to protect the rights of the party. Since 2013, legal aid has also been available to companies with financial constraints if the claim does not seem devoid of any chance of success.

**JUDGMENT, APPEAL AND ENFORCEMENT****Time frame for first-instance decisions****13** | How long does a commercial claim usually take to reach a decision at first instance?

In general, a commercial litigation before a court of first instance in Austria takes between nine months (district courts) and 17 months (regional courts). If the case is rather complex or if the court accepts an extended range of evidence to be heard, the litigation process may take considerably longer. In domestic arbitration, the duration is normally between one and three years.

**Time frame for appeals****14** | What proportion of first-instance judgments are appealed? How long do appeals usually take?

There is considerable difference in the respective practices of the various states of Austria. As a general rule, approximately half of the judgments are appealed before the second instance of the respective state. On average, the second instance takes between 12 and 18 months. Only a small proportion of these judgments are appealed before the Austrian Supreme Court. There, an average appeal takes approximately one year.

**Enforcement****15** | What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There are no comprehensive statistics available with regard to the proportion of judgments that require enforcement proceedings. In practice, the respective number seems to be rather low.

The enforcement of Austrian judgments is governed by the Code of Civil Procedure and by the provisions of the Austrian Enforcement Regulation. A judgment rendered by an Austrian court is, in general, enforceable if it is final and binding and if the court has not suspended its enforcement, or it is not yet legally binding, but its provisional enforcement has been authorised by the court. In addition, the court making the judgment on the merits is competent to directly order the necessary enforcement measures.

In general, the enforcement of an enforceable judgment or arbitral award in Austria is not seen as particularly burdensome, expensive or unpredictable.

## COLLECTIVE ACTIONS

### Funding of collective actions

**16** | Are class actions or group actions permitted? May they be funded by third parties?

Apart from the joinder of parties, Austrian law does not provide for specific collective redress. However, a class action mechanism has nevertheless been part of Austria's civil procedural law practice for more than 10 years. This particular instrument, often referred to as 'class action Austrian-style' is based on the combination of several elements of the Code of Civil Procedure. In principle, a claim can be asserted by the original owner of a claim and a third party to whom the claim has been assigned. Further, if a plaintiff asserts several claims against the same defendant, they can bundle all claims into a single set of proceedings. Finally, if the assignee and class action claimant happen to be a specific association (eg, a consumer organisation), claim-size restrictions are removed so that all claims can be brought before the Supreme Court, regardless of their individual claim size. The Austrian Supreme Court explicitly approved the funding of such a class action by a third party in the 2013 Austrian Supreme Court decision (OGH 27 February 2013, Ob 224/12b). Subsequently, third-party funders have shown increasing interest in funding Austrian-style class actions, which has gained public interest. Cases include those against Volkswagen, a truck cartel, GIS and AWD.

At the time of updating this chapter, the (EU) 2020/1828 Collective Redress Directive has not been implemented into Austrian law, although the due date was 25 December 2022. The Ministry of Justice is working on a draft, but no wording has been officially published or presented so far to the Parliament; it is still under discussion between the political parties.

## COSTS AND INSURANCE

### Award of costs

**17** | May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

As a general principle, court fees as well as all other expenses arising from the litigation, including the opposing lawyer's fees, are borne by the losing party. If a party prevails only in part, the fees and expenses will be split proportionately between the parties. In the event of a settlement, the costs are incurred by the parties according to the terms and conditions of the settlement agreement.

The Austrian courts determine and allocate both the court costs and the party costs according to the tariff schedules applicable, which often differ from the actual legal fees incurred. Similar rules as to the determination of court and party costs apply to appellate proceedings before the state courts and the Austrian Supreme Court.

So far, the courts have not ordered an unsuccessful party to pay the litigation funding costs of the successful party, although section 41 of the Code of Civil Procedure (CCP) would provide the basis for a rather broad spectrum of costs compensation in favour of the successful party.

### **Liability for costs**

#### **18 | Can a third-party litigation funder be held liable for adverse costs?**

The CCP does not provide a basis for the court to order or find liable a third-party funder to pay adverse costs. In practice in Austria, a funder's contractual obligation towards the claimant to cover the costs of the litigation does not apply to the opposing party.

In theory, there are two ways in which a litigation funder can be held liable for these costs by the prevailing respondent.

If the unsuccessful claimant assigns their claim against the funder to cover the adverse costs imposed on them by the court to the respondent (and the litigation funding agreement allows for such an assignment), the respondent can take the assigned claim against the funder to the competent court.

If the claimant refuses to pay the adverse costs and does not assign the said claim to the respondent (or the funding agreement does not allow for an assignment), then the respondent must take legal action against the claimant. In practice, the Austrian courts, in their judgments, grant recourse to the prevailing respondent against the claimant to recover such costs. According to the provisions of the enforcement order that govern the enforcement of a judgment, the successful respondent can request the local debt collection office to issue a payment order against the claimant. If the claimant fails to pay the costs due and the competent court eventually declares the claimant insolvent, the claim against the funder will become part of the bankruptcy assets and can subsequently be brought to court against the funder by the bankruptcy estate or, under certain circumstances, the respective creditors.

### **Security for costs**

#### **19 |**

20 | May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

There are two different types of security for costs that Austrian courts may order a claimant to provide.

The courts usually order the claimant to post a security for the expected court costs. In addition, the claimant must advance the costs for taking the evidence they requested.

At the request of the defendant, the claimant must provide security for the potential compensation of the opposing party's costs if the claimant has no residence or registered office in Austria. No security for the potential costs of the opposing party is admissible if the claimant is domiciled in a country with which Austria has entered into a treaty that excludes such security (which essentially excludes security for cost orders against all claimants resident or registered within the EU).

The CCP does not provide a basis to request such security from the funder of a claim and there have been no cases reported where Austrian courts considered such a request.

20 | If a claim is funded by a third party, does this influence the court's decision on security for costs?

In most of the cases funded so far by third-party funders in Austria, the funder's engagement has been disclosed neither to the court, nor to the respondent. In the few cases observed where the existence of a funder has been communicated, the involved courts determined advances and securities solely based on the claimant's status and did not take the existence of the third-party funder into account.

## Insurance

21 | Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE litigation insurance is not common in Austria. Although no legal or regulatory restrictions limit the respective product, there is currently no standard offering available. However, some foreign insurance companies have been reported to offer ATE insurance in a number of cases in Austria.

By contrast, legal costs insurance is commonly used in Austria. If it is arranged before the need to litigate arises, it provides cost coverage to the extent of the specific policy, but it is usually limited to certain types of claims.

## DISCLOSURE AND PRIVILEGE

### Disclosure of funding

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22 | Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

The Code of Civil Procedure does not provide the basis for a litigant to mandatorily disclose the litigation funding agreement or even the fact that they are supported by a third-party funder. It also does not provide a basis for an Austrian court to order a litigant to do so.

Whereas some authors have argued that a litigant might have such an obligation in domestic arbitration under specific circumstances, there have been no cases reported where a litigant was required to disclose the litigation funding agreement in an Austria-based arbitration.

In (domestic and international) arbitration proceedings administered by the Vienna International Arbitral Centre, the existence of any funding and the name of the funder (but not the entire funding agreement) must be disclosed at the outset (art 13a VIAC Rules 2013).

### Privileged communications

23 | Are communications between litigants or their lawyers and funders protected by privilege?

Whereas any legal advice given by an Austrian or non-Austrian lawyer to a litigant is privileged and does not have to be disclosed to the other party or the court, the communications between litigants or their lawyers and third-party funders are not protected by legal privilege. Confidentiality can be provided, however, by way of non-disclosure agreements between a funder, lawyer and client.

There have been no cases reported where such communications had to be disclosed by order of an Austrian court.

## DISPUTES AND OTHER ISSUES

### Disputes with funders

24 | Have there been any reported disputes between litigants and their funders?

No disputes between litigants and funders have been reported in Austria so far.

### Other issues

25 | Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

With no legislation regulating third-party funding in Austria, the Austrian Supreme Court's judgments give guidance on various aspects including the legality and enforceability of

funding agreements. The ongoing discussions and initiatives to regulate third-party funding at the EU level will more than likely impact the future of third-party funding in Austria.

## UPDATE AND TRENDS

### Current developments

**26** | Are there any other current developments or emerging trends that should be noted?

The Austrian Supreme Court declared permissible the sale of insolvency avoidance claims, and thus overruled the view of scholars in Austria that has prevailed for decades (OGH 17 June 2019, 17 Ob 6/19k). This has opened up new possibilities for third-party funders to finance avoidance claims in insolvency proceedings and has given insolvency administrators a valid new option to pursue claims, which was previously not possible due to a lack of assets. The creditors in insolvency proceedings have ultimately benefited from this development.