

of probabilities, the objection is well-founded (see Guidelines, G-IV, 7.5.3 – March 2022 version). With respect to the publication date of a cited document, at least **prima facie evidence** is required. Prima facie evidence means evidence which is sufficient, on its own, to establish a fact or to raise a presumption of the truth of a fact unless controverted (see T.750/94, point 6 of the Reasons; T.526/12, point 1.4 of the Reasons; T.1066/13, "directory listing" – no prima facie evidence). Thus, not every indication or hint qualifies as prima facie evidence. If the objection is properly raised, it is then up to the applicant to prove otherwise or at least to submit evidence to displace the prima facie evidence. If the applicant successfully challenges prima facie evidence concerning a fact, e.g. the nominal publication date of a document, the burden of proof shifts back to the examining division to establish that the document was made available to the public (see e.g. T.929/94, point 2.1 of the Reasons). As to the case in hand in T.545/08, the board found, among other things that, in the absence of prima facie evidence of the public availability of document D1, the examining division had not been entitled to consider it as prior art in its first substantive communication without providing further explanations and evidence as to its public availability before the priority date (see also T.1961/13). Thus, the objection was not properly raised. It could not generate an obligation on the applicant's side to submit evidence against the assumed publication date.

In **opposition proceedings** the burden of proving that the objections raised under Art. 100 EPC have been substantiated lies with the opponent. Where the opposition division has decided to maintain the patent and the opponent has filed an appeal against this decision, the burden of demonstrating **on appeal** that the reasons for maintaining the patent were justified is not automatically shifted to the patent proprietor (T.667/94). In other words, appeal proceedings do not result in a shift in the burden of proof to the detriment of the patentee; before the opposition division it is the opponent who bears the burden of proof of demonstrating that the patent does not fulfil the requirements of the EPC (T.1210/05). However, once the opposition division has decided to revoke the patent, the burden shifts to the proprietor of the patent, who then has to demonstrate on appeal that the reasons for revoking the patent were not sound, i.e. that the opposition division's decision was wrong as to the merits (T.585/92, OJ 1996, 129; point 3.2 of the Reasons).

In T.2037/18, the board stated that the burden of presentation and the burden of proof could shift if one party either had prima facie demonstrated the facts it had submitted (T.382/93) or had presented and demonstrated facts that pointed to a presumption in its favour (T.743/89, in some cases also referred to as prima facie evidence), with the result that the opposing party then had to present and demonstrate facts (T.109/91) to show that the circumstances of the case should be assessed differently from how it appeared prima facie or on the basis of the presumption. The burden of proof could, however, only be shifted on the basis of the prima facie evidence submitted or when the party that initially bore the burden presented a typical course of events supporting a presumption in its favour (T.570/08). Only then was it down to the opposing party, which now bore a secondary burden of proof, to offer up counter-evidence or overcome the presumption (T.1162/07).

The board in T.734/18 noted that none of the cases cited by the appellant-patentee (T.2451/13, T.202/13 or T.2338/13) supported the view that the burden of proof should be shifted due to a common sphere of interest between the parties. These decisions rather