

The standard of the **balance of probabilities** is applicable when both the patent proprietor and the opponent had access to the material of which public prior use is alleged (see e.g. T 363/96, T 12/00, T 1105/00, T 2043/07, T 1464/05, point 4.3 of the Reasons; T 202/13, point 15.6.2 of the Reasons; T 1170/13, point 2.3 of the Reasons). In T 1984/14, the board held that since practically all the supporting evidence lay within the power and knowledge of the patent proprietor, the balance of probabilities standard applied to the evidence (provided by witnesses) regarding the public availability of D28a (software).

In the following cases, it was decided that the evidence did not lie within the sphere of the opponent and therefore that the **balance of probabilities** was the applicable standard of proof: T 918/11 (selling of containers outside the sphere of the opponent – mass production); T 55/01 (mass-produced goods offered for sale to customers); T 1170/13 (circumstances in relation with prior use showed that opponent did not easily dispose over all the necessary evidence); T 12/00 (in a case involving third parties, both parties could collect evidence); T 1464/05 (no relationship between the opponent and the third party involved in the prior use – sale for test); T 64/13 (prior use based on a purchase agreement between two companies neither of which, according to the respondent (opponent), had a business relationship with it – prior use originally cited by a third company before the German Federal Patent Court).

There is no need to prove an actual sale of a product made for the **mass market**, because simply putting it on the market already makes it publicly available (see T 55/01, point 4.1 of the Reasons, which was summarised and discussed in T 2165/18).

In T 1505/16 (slide mechanism of vehicle seat), the board, contrary to the opposition division, which had decided that the standard of proof to be applied was "beyond reasonable doubt" (or "absolute conviction"), held that according to established case law (citing T 184/07 and T 55/01 by way of example) the "balance of probabilities" standard of proof was usually applied to evaluate an alleged prior use relating to mass-produced consumer products.

See also T 563/18, in which the board likewise disagreed with the higher standard applied by the opposition division. Whilst the specific prior-use vehicle had indeed been within the opponent's control, the prior-use turbocharger had been sold as a component of a Golf IV vehicle produced and sold on a mass scale in 2003.

In case T 473/13 the alleged public prior used was by the respondent and patent proprietor, who had initially to prove a confidentiality agreement (burden of proof). The board considered that the much-cited "up to the hilt" criterion did not apply in the present circumstances, since the case law in this respect had been developed for the situation in which a prior use was by the opponent, which was not the case here.

In T 12/00, T 254/98 and T 729/91 the opponent alleging the public prior use was not involved in the circumstances relating to it (T 202/13).

In T 734/18, the appellant-proprietor contended that Company E, an independent supplier of coffee-machines having business relations with both it and opponent 1, had assisted