

5. Burden of proof

5.1. Apportioning the burden of proof

5.1.1 General

In the absence of relevant EPC provisions, the principles concerning the allocation of the burden of proof have been developed through the case law of the boards of appeal. **Each party bears the burden of proof for the facts it alleges.** At all events, a party cannot deny facts which related to its own actions or were the subject of its own perceptions on the ground of "ignorance", if the presentation of the facts in question is essentially the party's responsibility (T 247/98).

T 2037/18 concerned whether an opposition had met the requirements for "adequate substantiation" and thus been admissible and, in particular, whether the opponent, which had alleged a prior use, should have substantiated an asserted lack of a non-disclosure clause. Addressing in detail the burden of proof and the burden of presentation, the board held that in most legal systems and in proceedings before the EPO (beyond the area open to examination by the EPO of its own motion), the burden of presentation and the burden of proof were allocated such that each party had to present and prove the facts that were favourable to them, i.e. the facts that supported their own assertions (T 219/83, T 270/90). The principle of "*negativa non sunt probanda*", also recognised in the boards' case law (see R 15/11, R 4/17), was a clear expression of this allocation of the burden of proof. In other words, a party to the proceedings was not required to prove a negative fact. As a general rule, the burden of presentation followed the burden of proof.

In T 1201/14 (transfer of right of priority), as regards the applicable rules for assessing the evidence adduced (affidavits), the board concluded the following: the burden of proving a valid transfer of the right of priority lay with the patent proprietor (appellant) since it was the one claiming that right (see e.g. T 1008/96, point 3.3 of the Reasons; T 1056/01, point 2.10 of the Reasons; T 493/06, point 8 of the Reasons; T 205/14, point 3.5 of the Reasons). This rule was all the more applicable taking into account that the patent proprietor (appellant) alone had access to the relevant evidence when it asserted a concluded transfer of rights.

In **ex parte proceedings** the applicant bears the burden of proof for the facts in his favour, e.g. the fact that a document cited by the examining division does not form part of the state of the art (T 160/92, OJ 1995, 35), the fact that the conditions laid down in Art. 123 EPC have been met (T 383/88) or the fact that a limitation of the claims is admissible (T 2/81, OJ 1982, 394). Sufficient disclosure also obliges the applicant to provide evidence of the skilled person's relevant knowledge if there is reason to believe it may not cover all the subject-matter claimed. If reasonable doubts exist about the scope or public nature of the specialist knowledge required for adequate disclosure of the invention, the applicant discharges his duty to disclose by submitting suitable evidence in support of the facts in his favour, in order to fulfil his duty to disclose the invention (T 82/07). In T 32/95, the board referred to a passage from the Guidelines (now G-IV, 1 "State of the art" – March 2022 version, which is cited in full in connection with T 750/94, under chapter III.G.4.3.1 above).