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The Rights of a Party in the Proceedings for the Grant of a Patent

Prawa strony w postępowaniu w sprawie udzielenia patentu

SUMMARY

The goal of the article was to present the legal position of an applicant in the proceedings for the grant of a patent (the so-called application proceedings, which constitutes the main form of patent proceedings). The article contains a comparative law analysis of the party's active procedural rights in the patent application proceedings and general administrative proceedings. First, the author explained – controversial in the doctrine – the concept of a party to the patent application proceedings, and then discussed their procedural rights at various stages of the procedure, indicating similarities and differences to the solutions adopted in the general administrative procedure. The topic of the considerations remains valid and important in the era of building an innovative economy.

Keywords: rights of a party; patent application proceedings; general administrative proceedings

INTRODUCTION

The proceedings for the grant of a patent (the so-called application proceedings) before the Patent Office of the Republic of Poland are meant to consider the request of a party for legal protection of the submitted invention project and to issue an administrative decision on the matter. This will be a positive decision when statutory conditions are met that are required to obtain a patent (i.e. the conditions concerning the object for which a patent can be granted and eligibility criteria associated with the right to obtain a patent), or a negative one. A positive decision is conditional because a patent is granted on condition a fee has been paid for the first protection period (i.e. the first 3 years of protection of the date of patent submission). In case of failure to pay this fee, the Patent Office declares the decision to grant a protection

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title null and void. The Patent Office confirms the fact of granting a patent by issuing a patent document to the entitled party. The note about the granting of exclusive rights is entered in the appropriate registry of the Patent Office and made public by publication in The Patent Office Gazette (*Wiadomości Urzędu Patentowego*).

The proceedings for the grant of a patent are special administrative proceedings, which means that they are to some extent regulated by the provisions of the Act of 30 June 2000 – Industrial Property Law[1], including executory provisions based on it, while in matters not covered by these provisions, the provisions of the Code of Administrative Proceedings[2] apply as appropriate (Article 252 IPL). This manner of regulation of patent procedures produces many interpretation problems, underlying which there is the question whether the principles of general administrative proceedings can apply in this field.

The goal of the article is to conduct a comparative law analysis of the procedural rights of a party in the application proceedings and general administrative proceedings. At issue are a party's active rights – the ones that enable a party to take specific action, unlike passive rights consisting in the justified expectation of specific behaviours of an administration authority, e.g. the right of a party to the legal conduct of proceedings (Articles 6 and 7 CAP), the right to expect an administrative authority to *ex officio* take into consideration the public interest and legitimate interest of citizens (Article 7 CAP), to resolve doubts in favour of a party (Article 7a CAP), to expect cooperation of various authorities in so far as it is necessary to fully clarify the facts and legal status of the case (Article 7b CAP), to expect the conduct of proceedings in such a manner as to deepen the participants' trust in the public authorities (Article 8 § 1 CAP), to be duly and fully informed (Article 9 CAP), and the case to be disposed of without undue delay, i.e. within a reasonable time (Article 12 § 1 CAP).

CONCEPT OF A PARTY IN THE APPLICATION PROCEEDINGS

The institution of a party to the proceedings for the grant of a patent differs from the regulations provided for in the CAP. The status of a party in the general administrative proceedings is determined by the fact that the proceedings concern a person's legal interest or duty or that they request the authority's action due to their legal interest or duty (Article 28 CAP). The element that qualifies a person as a party to the proceedings is their legal interest in resolving the case. According to Article 29 CAP, the parties to these proceedings can be natural persons (regardless

[1] Consolidated text Journal of Laws 2017, item 776 as amended, hereinafter: IPL.

[2] Act of 14 June 1960 – Code of Administrative Proceedings (consolidated text Journal of Laws 2018, item 2096 as amended), hereinafter: CAP.

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of their age, capacity to act in law, citizenship and other factors that determine the position of a human), legal persons (domestic or foreign) or any group of people that constitutes a state or self-government organizational unit or social organization (regardless of having or not having the status of legal person). Consequently, it follows that a party to the proceedings cannot be only a group of persons that does not have the status of a legal person or is not a state or self-government organizational unit, or a social organization (e.g. a civil law partnership or general partnership)[3].

Entities that do not satisfy the conditions specified under Article 29 CAP have the administrative law capacity only when specific provisions so provide. An example of a special provision is Article 3 (1) (1) IPL in conjunction with Article 235 (2) IPL, which allows organizational units without the status of a legal person to participate in the proceedings before the Patent Office more broadly than the CAP does. A party to the application proceedings can be any unit, not only a state or self-government organizational unit. Unlike the CAP, the Industrial Property Law Act does not combine the status of the party with the legal interest or duty of an entity since the provision of Article 235 (2) IPL stipulates that a party to the proceedings for the grant of a patent (or other exclusive rights) before the Patent Office is the applicant. This provision is a *lex specialis* in relation to Article 28 CAP. The applicant is a party to these proceedings regardless of whether, objectively speaking, they have a legal interest in disposing of the case. What is more, even in the course of the application proceedings, the authority does not essentially examine the question of the existence of legal interest in the meaning of the CAP, e.g. of whether the applicant should actually be the subject holding the patent granted[4]. The matter will be examined in special circumstances, i.e. when the charge of the absence of the right to obtain a patent is made by third parties under Article 44 (1) IPL or by a third party really entitled to obtain the patent – as under Article 74 IPL. According to A. Szewc:

> […] a person who has a legal interest in disposing of the case but is not the applicant (an author of the invention project, a person jointly entitled to the project, who omitted to apply for protection, third parties interested in preventing the applicant's monopoly of the object submitted) is not a party to such proceedings. The only exception is the situation when the person actually entitled to obtain the patent […] – in case an application is made by an unauthorised person – files requests to the Patent Office, specified in Article 74 IPL[5].

[3] Z.R. Kmiecik, *Postępowanie administracyjne, postępowanie egzekucyjne w administracji i postępowanie sądowoadministracyjne*, Warszawa 2019, p. 93.

[4] Otherwise K. Celińska-Grzegorczyk, *Postępowanie patentowe jako szczególne postępowanie administracyjne*, Warszawa 2009, p. 137.

[5] A. Szewc, *Urząd Patentowy Rzeczypospolitej Polskiej i postępowania przed tym Urzędem*, [in:] *System Prawa Prywatnego*, t. 14A: *Prawo własności przemysłowej*, red. R. Skubisz, Warszawa 2012, p. 222.

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It follows from the provision in question that where the invention is submitted by an unauthorised person, the authorised person (someone who has the right to be granted a patent) may request that the proceedings be discontinued or that they be granted a patent upon reimbursement of the costs of patent application. If, however, the patent has been granted to an unauthorised person, the authorised person may request that the patent be cancelled or the granted patent be transferred to them upon reimbursement of the costs of obtaining the exclusive right. If the unauthorised and authorised persons make statements before the Patent Office, in which the unauthorised person informs the Patent Office that they filed the application without being entitled to do so, and the authorised person requests that for example they be granted the patent, then the authority will recognize these documents as sufficient grounds for party substitutions[6]. If, however, a dispute arises over who has the right to be granted the patent, it should be resolved in the civil proceedings (Article 284 (2) IPL). Until the preliminary issue has been resolved, the Patent Office should stay the proceedings under Article 97 § 1 (4) CAP. When the entitled person requests that the patent be cancelled, appropriate decisions should be made by the Patent Office in the adversarial proceedings (Article 255 (1) (1) IPL); cases concerning the transfer of a patent obtained by an unauthorised person are heard in the civil proceedings before a court of law (Article 284 (11) IPL).

In the doctrine, it remains a contentious question whether the entity requesting the discontinuance of proceedings or the grant of an exclusive right becomes a party to the application proceedings. According to A. Szewc, the fact that the entitled person requests the discontinuance of the proceedings instituted by the unauthorised person does not make them a party to these proceedings. Nor does it give them the status of a participant with the rights of a party[7]; things are different when in these circumstances the person entitled to a patent (or any other protected title) requires that the exclusive right be granted to them, then they replace the previous party (the previous applicant)[8].

The procedural situation of the actually entitled person is perceived differently by T. Kiełkowski. He believes that the entitled person has the status of a sec-

[6] M. du Vall, *Prawo do uzyskania patentu i jego ochrona*, [in:] *System Prawa Prywatnego…*, p. 398.

[7] Under certain circumstances, particularly if the person entitled to the patent participates in person at some stage of the proceedings, they can be treated as another participant in the proceedings, e.g. when the person is testifying, they can be treated similarly to a witness.

[8] A. Szewc, *Udział osób trzecich w postępowaniu administracyjnym (na przykładzie postępowań w sprawach ochrony własności przemysłowej)*, „Administracja. Teoria – Dydaktyka – Praktyka" 2012, nr 2, p. 13.

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ond-class participant because they do not have full procedural rights, in particular they cannot file a petition for a judicial review[9].

The problem is viewed differently by K. Celińska-Grzegorczyk, who claims that although the entity filing the requests in question is not a party to the already pending proceedings, the filing of any of these requests initiates a kind of separate application proceedings. She observes that the procedural rights of this entity will be determined by the specific character of their participation in the proceedings, taking into consideration the fact that it is they who should have the right to act as the applicant[10].

This view is shared by G. Rząsa, who argues that:

> […] the conception of a *sui generis* institution closely corresponds with the content and function of Article 235 (2) IPL, as well as with the principle that the Patent Office is not empowered to decide the issue of the right to obtain a patent in the application proceedings […]. If a dispute arises over who has the right to be granted the patent, the Patent Office of the Republic of Poland should stay the proceedings under Article 97 § 1 (4) CAP (in conjunction with Article 252 IPL), referring the applicant and the entity filing the request under Article 74 IPL to civil procedure […]. If the court finds that only the entity that filed requests under Article 74 IPL has the right to obtain the patent, the Patent Office should: 1) discontinue the application proceedings initiated by the entity not entitled to obtain the patent (in the situation when the entitled person requested discontinuance of the proceedings); 2) examine the case on its substance with the participation of the actually entitled person filing the application for the grant of the patent, and at the same time discontinue the application proceedings in relation to the initial petitioner. In the first case, the legal measures against the decision to discontinue the application proceedings (a petition for judicial review, an action brought before the Voivodeship Administrative Court) will be only the applicant's right. […] In the second case, the entity petitioning for the grant of the patent to them, assumes the procedural position of the applicant (thus becoming a party to the proceedings), which, in particular, enables the entity to retain the right of priority stemming from the fact of the application being filed by an unauthorised person. In turn, the initial applicant loses the applicant's status and will have the right to only appeal against the decision to discontinue the proceedings in relation to them[11].

The literature points out that in the case of many entities jointly making an invention application to the Patent Office, we are dealing with one party rather than with as many parties as there are co-applicants[12]. Article 72 (3) in conjunction

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[9] T. Kiełkowski, *Strona i uczestnicy w postępowaniu patentowym*, „Przegląd Prawa Handlowego" 2005, nr 8, p. 39–40.

[10] K. Celińska-Grzegorczyk, *op. cit.*, p. 145.

[11] G. Rząsa, [in:] *Prawo własności przemysłowej. Komentarz*, red. P. Kostański, Warszawa 2014, p. 1167. Similarly Z. Miklasiński, *Prawo własności przemysłowej. Komentarz*, Warszawa 2001, p. 262. As T. Kiełkowski (*op. cit.,* p. 38) rightly observes, the Code of Administrative Proceedings does not in principle allow the possibility of another entity replacing the petitioner (applicant) within the existing procedural relationship, and in this case there is no legal succession.

[12] G. Rząsa, *op. cit.*, p. 1165. The case is different in the general administrative proceedings, which can be conducted with two or more parties.

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with Article 72 (4) IPL should be accordingly applied to the relationship between the co-applicants. This means in particular that if all co-applicants do not agree to a specific action beyond the scope of the usual management of joint rights (e.g. the conversion of a patent application into a utility model – Article 38 IPL), the co-applicants holding at least half of the shares may request that the contentious issue be decided by the court. In this case, the Patent Office should stay the administrative proceedings under Article 97 § 1 (4) CAP and summon the co-applicants to initiate appropriate civil proceedings within the specified time limit (Article 100 § 1 CAP). The decision of the court will be binding upon the Patent Office (Article 365 § 1 of the Code of Civil Procedure). It should be stressed that the Patent Office is not competent to request the initiation of the civil proceedings because there is no suitable competence norm (according to the established judicial decisions, this norm is not Article 100 § 1 CAP[13]). However, during the proceedings before the Patent Office, each jointly entitled person may take conservative actions on their own (i.e. actions necessary to obtain or uphold an exclusive right), including the filing of appropriate appeals[14].

RIGHTS OF A PARTY AT THE STAGE OF INITIATION OF THE PROCEEDINGS

From the act itself of filing an application, the applicant can be substituted for by an attorney-in-fact. According to Article 32 CAP, a party may act through an attorney-in-fact unless the nature of the action requires that it be taken by the party personally, which usually does not occur in the proceedings before the Patent Office. Any natural person having the capacity to enter into legal transactions may be an attorney-in-fact of a party (Article 33 CAP).

In contrast, a party's attorney-in-fact in the proceedings before the Patent Office in cases concerning the filing and examination of applications and maintenance of the protection of the invention may be only a patent attorney or a provider of transborder services in the meaning of the Act on Patent Attorneys[15], and in the case of natural persons also: the co-entitled person, parents, spouse, siblings or the party's descendants and the persons in the adoption relation with the party (Article 236 (1) and (2) IPL). These provisions do not apply to persons that do not have a place of residence or seat in Poland because, according to Article 236 (3)

[13] See, for example, judgement of the Supreme Administrative Court of 8 April 2011, I OSK 850/10, Legalis.

[14] G. Rząsa, *op. cit.*, p. 1165. Similarly A. Szajkowski, H. Żakowska-Henzler, *Wspólność prawa do wynalazku*, [in:] *System Prawa Prywatnego…*, p. 548.

[15] Act of 11 April 2011 on Patent Attorneys (consolidated text Journal of Laws 2019, item 1861).

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IPL, in the above-mentioned cases they may act only through a patent attorney (or a provider of transborder services in the meaning of the Act on Patent Attorneys). With regard to foreign entities, there has to be mandatory representation by a patent attorney, excluding their action in person[16]. This obligation does not, however, apply to persons with a place of residence or seat in the European Union, in a member state of the European Free Trade Association (EFTA) – a party to the agreement on the European Economic Area or the Swiss Confederation.

A *lex specialis* with regard to the statutory regulation is also Article 239 IPL, which may authorise an organizational unit that provides services in this field (e.g. a patent attorney's office) to represent a party. In this case, the source of power of attorney is not a statement by the party but the statement by the head of the said unit, which indicates its employee – a patent attorney – as one empowered to act on behalf of the party.

While the administrative proceedings may be initiated upon the demand of a party or *ex officio*, the proceedings concerning the grant of a patent may be initiated only at the motion of the applicant (which follows from the nature of the proceedings). The day of opening the administrative proceedings upon the demand of a party will be the day the demand has been submitted to the public administration authority, and if a party submits the demand by means of electronic communication, this will be the day the demand has been entered into the teleinformatic system of the public administration authority (Article 61 §§ 3 and 3a CAP). The initiation of the proceedings establishes a procedural relation between the authority and the party (and possibly with potential participants in the proceedings), thereby defining their mutual rights and duties.

In the application proceedings, it is necessary to distinguish a petition for the grant of a patent from the patent application for an invention (despite the fact that the petition is formally a part of the application). The proceedings are initiated by the petition for the grant of a patent while the patent application for an invention, containing all the necessary elements, is a condition for an authority to take a substantive stance on the petition for the grant of a patent. The patent application for an invention is essentially the evidence that substantiates the petition for the grant of a patent. The period of patent protection – if a patent has been granted – is determined according to the day the application has been filed. The day the application has been filed also determines the applicant's priority to be granted

[16] A. Szewc, *Strony i ich pełnomocnicy w postępowaniach przed Urzędem Patentowym Rzeczypospolitej Polskiej*, „Administracja. Teoria – Dydaktyka – Praktyka" 2013, nr 4, pp. 31–32. The author points out that in the current legislation the compulsory representation by a patent attorney is not associated with the requirement to use the services of patent attorneys domiciled in Poland. Consequently, the persons referred to in Article 236 (3) IPL will be able to use the services of their own patent attorneys as long as the latter have the right to represent before the Patent Office of the Republic of Poland.

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a patent (Article 13 (1) IPL) and is a time reference frame for the assessment of such grounds for the grant of a patent as the novelty and the invention standard[17]. The patent application for an invention may be complemented in the course of the proceedings if the petitioner (applicant) has not at once included in the application all the elements required for the substantive disposal of the petition (e.g. they failed to exhaustively describe the essence of the invention). The date of receipt of the last missing document is considered to be the actual filing date (Article 31 (4) IPL). If the date of filing the application is different from the date of initiation of the proceedings (i.e. the date of filing a petition to grant a patent), the Patent Office acknowledges the date of filing the application by way of order (Article 41 (2) in conjunction with Article 13 (4) and (5) as well as Article 31 (4) and (5) IPL). If in the course of the proceedings the applicant fails to complete the application as to the required elements within the time limit fixed by the Patent Office, the proceedings will be discontinued. The elements necessary for filing the patent application for an invention are defined first of all in Article 31 (1) and (2) as well as in Articles 32 and 35 IPL, whereas the formal requirements of the petition for the grant of a patent should be examined in the light of Article 63 §§ 2 and 3 CAP. Since the petition is part of the application, the deficiencies in the other required parts of the application (description of the invention, drawings, patent claims) cannot be treated as formal defects of the petition for the grant of a patent. Failure to remedy the formal defects within the specified time limit will cause the application to remain unconsidered under Article 64 § 2 CAP. Leaving the application unconsidered should be treated as a technical-procedural action rather than a decision terminating the proceedings because the defective application was not able to produce an effect, i.e. the initiation of the proceedings. Only a correct procedural declaration is able to produce the intended legal effect[18].

RIGHTS OF A PARTY AT THE STAGE OF THE INVESTIGATION PROCEDURE

The party has the right to request the case files to be made available to them. In the administrative proceedings the rule of the relative openness of administrative case files applies, which means that only the party has this right whereas, as specified

[17] Idem, *Udzielanie patentów*, [in:] *System Prawa Prywatnego*..., p. 416.

[18] That is why we should critically asses the solution adopted in Article 255[1] (6) IPL, which provides for the discontinuance of litigation proceedings as the reaction of the Patent Office to failure to remove, within the specified time limit, formal defects from the request to initiate the proceedings since the proceedings that have not been initiated cannot be discontinued. See more broadly Z.R. Kmiecik, *Wszczęcie ogólnego postępowania administracyjnego*, Warszawa 2014, p. 116.

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by the CAP provisions, other participants in the proceedings are not entitled to it[19]. Under Article 73 § 1 CAP, the party has the right to review the case files and to make notes and copies in the course of the proceedings and after they have been finished. If the public administration authority keeps case files in electronic form, the authority "may" provide the party with access to them through its teleinformatic system, after the party has been identified in the manner specified in Article 20a (1) or (2) of the Act of 17 February 2005 on Informatization of Operation of Entities Performing Public Tasks[20] (Article 73 § 3 CAP). The wording of this provision is surprising because the party has the right to review the case files and a correlate of this right is the duty of the relevant authority to make the case files available to the party[21].

The proceedings for the grant of a patent are the object of general interest because this influences the legal and economic situation of many third parties (entrepreneurs and consumers). Unlimited access of third parties to the application documents might infringe upon the legal, economic and technical interests of the petitioner, which is why the legislation has introduced certain restrictions in this area[22]. Under Article 45 (1) IPL, during the period preceding the publication of a patent application filed[23], the files relating to the application may not be disclosed or made available to third parties without the applicant's consent. If, in the request for a patent, the applicant gives their consent, the Patent Office may only make available to third parties the information on the filing of the application, while disclosing its number, the filing date, the title of the invention and the applicant's name (Article 45 (2) IPL). In the light of Article 251 (1) IPL, complete application files can be made available at each stage of proceedings to: 1) applicants and their representatives; 2) prosecution agencies and courts (on account of cases handled by them); 3) other persons, with the applicant's individual consent given in writing.

[19] J. Borkowski, [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2011, pp. 322–323. The author rightly observes that the need to make files available to other participants in the proceedings (e.g. experts) may arise from their procedural role. Case files are then made available under an unappealable decision.

[20] Consolidated text Journal of Laws of 2019, item 700 as amended.

[21] See M. Kotulska, *Zakres stosowania środków komunikacji elektronicznej w postępowaniu administracyjnym*, „Samorząd Terytorialny" 2015, nr 7–8, p. 85.

[22] A. Szewc, *Udzielanie…*, p. 409.

[23] Pursuant to Article 43 (1) IPL the Patent Office publishes the particulars of the patent application in the Patent Office Bulletin, immediately after the expiry of 18 months from the date of priority to obtain the patent. The applicant may, within a period of 12 months from the date of priority, request publication at an earlier date. The patent application will not be published if the application relates to a secret invention, and if, before the publication date, a final decision has been taken on discontinuance of the proceedings or on refusal to grant a patent (Article 43 (2) IPL). From the date of publication of the patent application, a third party may inspect the application description of an invention and, until a substantive decision has been made, third parties may submit to the Patent Office any observations as to the existence of grounds that may prevent a patent from being granted (Article 44 (1) IPL).

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However, after the expiry of the time limits within which information on the applications may not be disclosed, the Patent Office may, at the request of a person having a legitimate interest, make accessible to that person the documents included in the application files; this does not apply to cases in which disclosure of the documents might jeopardize the legally protected interest of the patentee, in particular, violate business secrets (Article 251 (2) and (3) IPL). After the publication of the application for an invention, the Patent Office will *ex officio* make public only the report on the state of the art (Article 47 (4) IPL). The report is an opinion concerning the application. Together with the application documents (comprising the description of the invention, patent claims, and a brief description) it is entered into the records of applications on the Internet pages of the Patent Office.

Moreover, Article 45 (3) IPL allows the Patent Office, in the course of examination of the patent application, to seek necessary opinions without the applicant's consent. Their subject will generally be technical knowledge relevant to the assessment of patentability of an invention. Experts who participate in the preparation and issuance of the opinion are subject to the obligation of secrecy.

Under Article 73 § 2 CAP the party may demand that the copies of the case files made by the party be certified to be a true copy or that certified copies from the case files be issued to the party if that is justified by significant interest of the party. We can only agree with K. Celińska-Grzegorczyk's view that the right in the application proceedings is vested in "both the entities specified in Article 251 (1) IPL, and (after the expiry of time limits within which priority may not be disclosed) to persons having a legitimate interest (Article 251 (2) IPL)"[24].

The applicant has the right to actively participate in each stage of the proceedings, including the stage of preliminary investigation procedure (Article 10 CAP in conjunction with Article 252 IPL). As the IPL essentially does not regulate the procedural rights of the party in the course of evidentiary proceedings, the provisions of the CAP will accordingly apply (Title IV Part II). The model of evidentiary proceedings for the grant of a patent is influenced by the manner of examination of the grounds for patentability by the Patent Office.

The party has the right to submit evidence (Article 90 § 2 (1), Article 95 CAP in conjunction with Article 252 IPL) and submit motions for evidence (Article 75 § 2, Article 78 CAP in conjunction with Article 252 IPL). The Code specifies an open list of evidence: "[…] anything which is not contrary to law and which is of assistance in clarifying a case shall be admissible as evidence" (Article 75

[24] K. Celińska-Grzegorczyk, *op. cit.*, p. 228. The foregoing remarks do not relate to the filing of application of secret inventions because files concerning the application of a secret invention may be made available only to parties authorised by the competent National Defense Minister, competent Internal Affairs Minister or by Chief of the Internal Security Agency (Article 251 (4) in conjunction with Article 62 (2) IPL).

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§ 1). The evidence in the application proceedings is first of all official and private documents[25] because the proceedings are based on the principle of written form. Among the former, of special significance is the report on the state of the art, comprising a list of publications to be taken into account for the assessment of the submitted invention. It is moreover possible to examine evidence from inspection (e.g. prototypes or models), from witnesses, or experts. The evidence from an expert opinion is, however, auxiliary evidence because – in accordance with Article 254 IPL – when assessing the conditions required for the grant of a patent, the evidence based on the expert's opinion is not used unless the Patent Office deems this evidence necessary. This means that the Patent Office may appoint an expert under Article 84 § 1 CAP in conjunction with Article 252 IPL when special knowledge is required which is outside of the competence of the expert appointed for the case[26]. However, the expert opinion submitted by the party with regard to the assessment of the satisfaction of conditions required to obtain an exclusive right may not be accepted as evidence[27]. As a last resort, applying Article 86 CAP as appropriate, the authority may also hear a party.

It should be considered whether any evidentiary motion submitted by the applicant will be binding upon the Patent Office. Under Article 78 § 1 CAP, the authority conducting the proceedings is obliged to accept the evidentiary request if its subject is the circumstances material to the case. The Code provides a different regulation when the party requests admission of evidence after the evidentiary proceedings – conducted in chambers or during the hearing – have been terminated (§ 2). Article 78 § 2 CAP stipulates that a public administration authority may refuse to allow the request which has not been submitted in the course of evidentiary proceedings or during the hearing if the request concerns circumstances already proven by other evidence, unless such circumstances are material to the case. It should be assumed that the authority should allow the party's request for admission of evidence during the evidentiary proceedings even when the circumstances being the subject of evidence have already been proven if these are material to the case. When the party requests admission of evidence after the evidentiary proceedings have been

[25] Within the meaning of Article 76 § 1 CAP, the Patent Office may also use documents gathered in the application or opposition proceedings conducted with regard to the same inventions (i.e. applications within one patent family) before the Republic of Poland's Patent Office or before other patent offices.

[26] See judgement of the Supreme Administrative Court of 19 April 2012, II GSK 1140/11, CBOSA; judgement of the Supreme Administrative Court of 21 April 2010, II GSK 562/09, CBOSA.

[27] K. Gliściński, [in:] *Prawo własności przemysłowej. Komentarz*, red. A. Michalak, Warszawa 2016, p. 692. An expert may be appointed pursuant to the CAP regulations – if the Patent Office deems it necessary – after the publication of the invention application. At an earlier stage, in the course of the application examination, is applied Article 45 (3) IPL which specifies the principles of seeking such opinions.

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ended, two situations can be distinguished: one, when the subject of the evidence motion is the circumstances not proven earlier by other evidence, the other – when the subject of evidence is the circumstances already proven. In the former, the significance for the case of the circumstances that are the subject of the submitted evidence is assessed in the same way as when the party requests the examination of evidence during the evidentiary proceedings (the authority in question assesses the circumstances submitted as evidence with regard to its connection with the subject of the case), whereas in the latter, the authority will admit the evidence for the circumstances already proven by other evidence only when the circumstances in question have been interpreted to the disadvantage of the party, and the party requests the examination of evidence to the contrary[28].

The party has the right to actively participate in the evidentiary proceedings involving the examination of witnesses, experts, inspection, and submit explanations (Article 79 CAP). Similarly, if experiments and tests are made, the party has the right to participate in them[29].

In its judgement of 4 April 2005, the Voivodeship Administrative Court in Warsaw pointed out that "the Patent Office as a public administration authority has, i.a., to observe the principle of objective truth, to completely examine and evaluate evidence, and assess, based on the evidence material, whether given circumstances have been proven (Article 7, Article 77 § 1 CAP)"[30]. We cannot agree with the view expressed by some authors[31] that the burden of proof in the administrative proceedings lies with the public administration authority. In the administrative proceedings, like in other proceedings, the burden of proof rests with entities that derive legal effects (to their advantage or to the advantage of interests that they defend) from material facts. It is necessary to distinguish between the duty to provide evidence resulting from the burden of proof and the legal duty of providing evidence, which rests on the public administration authority. This duty is specified by Article 77 § 1 CAP, under which the public administration authority is required *ex officio* to comprehensively collect and examine all evidence. The duty to provide evidence involves the collection, examination and presentation of evidence significant for the explanation of facts. If the party to the administrative proceedings does not exercise the right to evidentiary initiative, the party may and should expect the

[28] Z.R. Kmiecik, *Proceduralny stosunek administracyjnoprawny w ogólnym postępowaniu administracyjnym*, [in:] *Podstawowe zagadnienia konstytucjonalizmu państw współczesnych. Księga jubileuszowa dedykowana Profesor Ewie Gdulewicz w siedemdziesięciolecie urodzin*, red. W. Skrzydło, R. Mojak, „Studia Iuridica Lublinensia" 2014, nr 22, DOI: http://dx.doi.org/10.17951/sil.2014.22.0.447, pp. 453–454.

[29] A. Szajkowski, *Udzielanie ochrony patentowej*, Warszawa 1979, p. 125.

[30] Judgement of the Voivodeship Administrative Court in Warsaw of 4 April 2005, VI SA/Wa 1319/04, Legalis.

[31] See, for example, K. Celińska-Grzegorczyk, *op. cit.*, p. 230.

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authority conducting the proceedings to *ex officio* take action intended to establish the factual circumstances. Z.R. Kmiecik rightly assumes that in the administrative proceedings the party has a teleological duty of examining evidence, essentially only when the issue is the fact from which the party wants to derive legal effects and which stands in contradiction with the findings made by the authority based on other evidence, and when a legal provision requires that the party submit specific evidence or source of evidence (usually a document) in order to establish given factual circumstances. These are the only cases when the burden of proof implies the need to prove facts by the party on pain of refusal to positively consider the case. In other cases, it only justifies the usefulness of exercising the right to present evidence. The administration authority may, however, prevent the party from exercising this right, by dismissing their request for evidence[32].

Under Article 49 (2) IPL, before the Patent Office makes a negative decision, the applicant has the right, within the fixed time limit, to take a stance on the collected evidence and documents that show that there are grounds for the denial of a patent. All the explanations and evidence presented by the applicant in response to the objections raised should be taken into account by the Patent Office. This provision corresponds with Article 79a CAP, which stipulates that if the proceedings have been initiated at the request of the party, the public administration authority is obliged, while informing the party about the possibility of commenting on the collected evidence and documents as well as on the submitted requests, to point out to the party the conditions that depend on them that were not satisfied or shown on the day the information was sent, which may result in a decision contrary to the request of the party. Within the time limit specified for presenting opinions on the collected evidence and documents and filed requests, the party may submit additional evidence in order to prove that the conditions have been met. The provisions in question are not contrary to the general duty of examining evidence resting with the administration authority. The general right of the party to comment on the entirety of evidence before a decision has been issued is specified by Article 81 CAP.

In the course of preliminary investigation, the applicant may also exercise the following rights of the party to general administrative proceedings: 1) to request to exclude the Patent Office employee from the proceedings (Article 24 § 3 CAP); 2) to request the suspension of the proceedings (Article 98 § 1 CAP); 3) to request the discontinuance of the proceedings (Article 105 § 2 CAP); 4) to request the restoration of the time limit for performing a procedural act (restoration of statutory time limits is carried out based on the provisions specified in Articles 58 and 59 CAP; with regard to time limits for payment of fees for the protection of industrial property and the official procedural time limits the provisions of the Industrial

[32] Z.R. Kmiecik, *Postępowanie administracyjne*..., pp. 140–141.

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Property Law apply: Article 224 (4), Article 225, Article 226 (4), Article 242 (3), and Article 243 (1–4) and (6))[33].

There are doubts whether the applicant has the right to submit a reminder for failure to act by the Patent Office or for over-lengthy proceedings (Article 37 CAP). Under Article 253 (1) IPL the provisions of the Code of Administrative Procedure governing time limits for settling cases shall not apply to the processing of applications filed to obtain a patent. The question, therefore, arises about the objective scope of this exclusion. According to A. Szewc, the exclusion referred to in the provision in question applies to all provisions in Chapter 7 of the CAP Part I entitled "Disposal of Cases" (Articles 35–38)[34]. A different view was expressed by the Voivodeship Administrative Court in Warsaw in its judgement of 12 December 2007[35], showing both the reasons for this exclusion and its scope. In the Court's assessment the exclusion is meant, firstly, to enable the Patent Office to thoroughly examine the statutory conditions required for the grant of a protection right (a patent respectively), as well as to create the appropriate conditions necessary for this authority to meet the special, highly prolonged statutory deadlines effective in the proceedings for the grant of rights (e.g. the date under Article 43 (1) IPL). Secondly, the introduction of this exclusion is intended to exclude the possibility of submitting by the parties the early (i.e. without taking account of the above-mentioned statutory time limits) and thereby unjustified requests for making a decision (and, consequently, submission of complaints for failure to act) with reference to the lapse of time limits specified in the general CAP provisions. Due to the specific nature of the proceedings for the grant of exclusive rights, the Court argues that the provision of Article 253 (1) IPL includes only the application of Article 35 § 3 CAP on the time limits of disposing of the case. It cannot be acknowledged, the Court emphasizes, that the Patent Office is not bound by any timeframe in connection with the consideration of the application.

The stance expressed in this ruling requires approval with the reservation that the exclusion resulting from Article 253 (1) IPL should be referred to Article 35 §§ 2–3a CAP; § 2 specifies the time limit for disposing of the case that does not require conducting preliminary investigation, which should be dealt with immediately, on the spot; under § 3 the case that requires preliminary investigation should be disposed of within a month, and if it is particularly complicated – within 2 months from the commencement of proceedings, while appeals cases should be dealt with within a month of the appeal being received; in turn, § 3a specifies the

[33] See more broadly M. Kotulska, *Przywrócenie terminu w postępowaniach przed Urzędem Patentowym RP*, [in:] *100 lat ochrony własności przemysłowej w Polsce. Księga jubileuszowa Urzędu Patentowego Rzeczypospolitej Polskiej*, red. A. Adamczak, Warszawa 2018, pp. 490–509.

[34] A. Szewc, *Urząd Patentowy Rzeczypospolitej Polskiej…*, p. 222.

[35] VI SAB/Wa 38/07, Legalis.

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time limit for the disposal of the case in the summary proceedings, which should be dealt without delay, not later than within a month of the date of commencement of the proceedings. Since in the proceedings for the grant of a patent there are no specified time limits for the completion of the proceedings by issuing a decision, the following provisions also will not apply: Article 35 § 5 CAP (it specifies which time limits and periods are not counted in the running of the deadlines for disposing of a case) and Article 36 CAP (it specifies the duty of the public administration body to inform the parties of failure to dispose of the case within the mandatory time limit). In the application proceedings, the principle of prompt disposal of the cases specified in Article 12 § 1 CAP will apply, as will the general directive for the administrative authorities conducting the proceedings formulated in Article 35 § 1 CAP, which obliges them to dispose of cases "without unnecessary delay", that is within the period that is necessary for it with the proper organization of work[36]. The Court rightly observed in the judgement in question that the Patent Office is obliged to thoroughly examine the case but this may not unduly prolong the disposal of the case. The public administrative body may not, on the pretext of acting in the interest of the party, delay the issuance of a substantive decision where the existing evidence allows it to settle the case. There are no grounds for assuming that the party cannot challenge the dilatoriness of the Patent Office in conducting the case, especially if this authority undertakes no actions in the case or conducts the proceedings longer than it is necessary to dispose of it.

RIGHTS OF A PARTY AT THE STAGE OF ISSUANCE OF THE DECISION TO GRANT A PATENT

The Patent Office issues a decision to grant a patent if it finds in the procedure of complete examination that positive statutory conditions for obtaining a patent have been met (specified in Article 24 IPL) and that there are no negative grounds (under Articles 28–29 IPL). The Patent Office is bound by the decision from the date of its service to the applicant. The latter may request that the decision be completed as to the adjudication or the instruction about the right to file a petition for reconsideration (Article 111 § 1 CAP in conjunction with Article 244 (1) IPL), and that clerical and mathematical errors or other evident mistakes in the text of the decision be corrected (Article 113 § 1 CAP), and also request the issuing authority to clarify any doubts regarding the content of the decision (Article 113 § 2 CAP). Furthermore, the entitled person may request the rectification of evident errors or misprints in the patent description pursuant to Article 55 IPL. These two

[36] R. Orzechowski, [in:] *Kodeks postępowania administracyjnego. Komentarz*, red. J. Borkowski, Warszawa 1989, p. 128.

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error categories will be rectified after the issuance of the patent document, whose inherent part is the patent description, and after publication of the patent description by the Patent Office; hence, changes introduced at this stage may not infringe the substance of the protected invention. The correction of the description may not result in the decision to grant the patent, including the change of the scope of patent protection[37]. In its judgement of 1 March 2012, the Supreme Administrative Court stressed that Article 55 IPL is a special provision in relation to Article 113 CAP and, consequently, the interpretive rules developed based on the Code of Administrative Proceedings will not apply to it[38].

It appears that in the cases of an indefinitive decision to grant a patent the decision can be made immediately enforceable (Article 108 § 1 CAP in conjunction with Article 252 IPL). This need may arise with regard to the decision that partly takes account of the party's request (the decision that takes full account of the party's request will be enforced anyway before the expiry of the deadline for the filing of an appeal under the respectively applied Article 130 § 4 CAP). The decision can be made immediately enforceable *ex officio*, e.g. if it is essential for the protection of human life or health in an urgent situation requiring prompt actions by the state because of the existing or really imminent jeopardy to the life or health of the people. This is about the situation when it is impossible and there are no available measures to eliminate or prevent this jeopardy without use of the patent-protected invention. Under such circumstances, the state may wish to use instruments restricting the entitled person's monopoly, i.e. the institution of the legal use of the invention for state purposes as far as it is necessary under Article 69 (1) (2) IPL, or compulsory license pursuant to Article 82 (1) (1) IPL. The condition for the application of these regulations is the enforceability of the decision to grant a patent, which usually takes place with the decision becoming final, on condition of payment of the fee for the first protection period. To accelerate the possibility of use of these instruments it may be advisable to make the decision immediately enforceable. It appears that there is no reason why the Patent Office could not make the decision so enforceable at the request of the party because of their exceptionally important interest, e.g. in the situation when the entitled person would like to urgently assert claims on account of patent infringement[39], unless he failed to pay for the first protection period[40].

As P. Kostański emphasizes, making the decision immediately enforceable may be appropriate with regard to the indefinitive decision to refuse to grant a patent,

[37] P. Kostański, [in:] *Prawo własności przemysłowej*..., p. 350.

[38] Judgement of the Supreme Administrative Court of 1 March 2012, II GSK 86/11, CBOSA.

[39] It is possible to pursue claims for the period prior to the grant of a patent – Article 288 (2) IPL.

[40] The applicant should also pay fees for the subsequent protection periods, which have started to run before the time limit of the payment of fees for the first protection period – Article 224 (1) IPL.

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if the Patent Office has made a negative decision on the case before announcing the application and wants to refrain from publication of the invention application because the publication itself could be recognized as contrary to the public order[41] (cf. Article 43 (2) (2) IPL)[42].

CONCLUSIONS

In the era of building the culture of innovation and knowledge-based economy the question of rights of the patent applicant is becoming particularly relevant. The party to the application proceedings essentially has the same rights as the party to the general administrative proceedings, sometimes modified, due to the specificity of these proceedings, with regard to the content, scope, or the manner of implementation. The applicant will not, however, be able to exercise such rights of the party to the general administrative proceedings as the right to a settlement agreement (Article 114 CAP) or to conduct mediation (Article 96a CAP) because this is not allowed by the nature of the proceedings for the grant of a patent, i.e. the case is not contentious, and the proceedings are conducted with the participation of only one party; moreover, because mediation applies to the proceedings where regulations provide for different variants of a decision on the same case (i.e. the administrative authority acts within administrative discretion), whereas the substantive decision of the Patent Office is a restricted act because, depending on the results of the conducted examination, the Patent Office has to grant a patent if the result of the examination is positive (Article 52 (1) IPL) or refuse to grant it if the result is negative (Article 49 (1) IPL).

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[41] See Article 29 (1) IPL.

[42] P. Kostański, [in:] *Prawo własności przemysłowej*..., p. 342.

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STRESZCZENIE

Celem artykułu było przedstawienie pozycji prawnej zgłaszającego w postępowaniu w sprawie o udzielenie patentu. Opracowanie zawiera analizę prawnoporównawczą czynnych uprawnień procesowych strony w postępowaniu zgłoszeniowym (patentowym) i ogólnym postępowaniu administracyjnym. W pierwszej kolejności autorka wyjaśniła budzące kontrowersje w doktrynie pojęcie strony postępowania zgłoszeniowego, a następnie omówiła przysługujące jej prawa procesowe w poszczególnych stadiach postępowania, wskazując na podobieństwa i różnice w stosunku do rozwiązań przyjętych na gruncie ogólnej procedury administracyjnej. Temat podjętych rozważań pozostaje aktualny i ważny w dobie budowania innowacyjnej gospodarki.

Słowa kluczowe: prawa strony; postępowanie zgłoszeniowe (patentowe); ogólne postępowanie administracyjne