

COMPLAINT ABOUT A BAILIFF'S OMISSION TO TAKE ACTION: SELECTED COMMENTS *DE LEGE LATA AND DE LEGE FERENDA*

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1. INTRODUCTION

A complaint about a bailiff's action constitutes the basic complaint measure available in the judicial executive proceedings, which is at the same time an element of judicial supervision over a bailiff. Assessing the scope of admissibility of a complaint, *prima facie* one can see an unlimited scope of admissibility of this complaint measure. In accordance with Article 767 §1 sentences 1–2 Code of Civil Procedure (hereinafter CCP), there is a right to complain about a bailiff's action at a district court, unless stipulated otherwise in statute. It also applies to a bailiff's omission to take action. It is worth noticing that the specificity of the judicial executive procedure results in the possibility of filing complaints in these proceedings not only about a court ruling but also about such action of an executive body that does not constitute a ruling as well as about that body's omission to take action.¹ Thus, *expressis verbis*, in case of a bailiff's both active and passive conduct, a complaint about a bailiff's action is admissible.

Any bailiff's action may be subject to a complaint.² This means that the concept of "a bailiff's action" subject to the above complaint measure is characterised by

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¹ Compare, Z. Szczyrek, *Kodeks postępowania cywilnego. Postępowanie zabezpieczające i egzekucyjne. Komentarz*, Sopot 2013, pp. 155–156; A. Cudak, [in:] A. Marciniak, K. Piasecki (ed.), *Kodeks postępowania cywilnego*, Vol. III: *Komentarz do art. 730–1088*, Warsaw 2015, p. 177; H. Pietrzkowski, *Zarys metodyki pracy sędziego w sprawach cywilnych*, Warsaw 2005, p. 429.

² A. Cudak, *Skarga na czynności komornika*, Sopot 2015, pp. 7–8; A. Marciniak, *Nadzór judykacyjny nad czynnościami komornika*, PPE No. 6, 2011, pp. 14–15. A complaint is applicable to every type of a bailiff's action taken within his competence and to action referred to this executive body by a court (see, Article 1051 §3 CCP); thus, K. Korzan, *Sądowe postępowanie zabezpieczające i egzekucyjne w sprawach cywilnych*, Warsaw 1986, p. 199.

a broader meaning than the concept of “enforcement action” undertaken by this executive body, which is thoroughly discussed below. The scope of admissibility of a complaint about a bailiff’s action covers all legally regulated types of a bailiff’s conduct, i.e. positive conduct (action) as well as negative conduct (omission). Therefore, it is rightly emphasised in jurisprudence that admissibility of a complaint, the substrate of which is a complaint about a bailiff’s omission, constitutes a typical precedent in the system of complaint measures in civil procedure.³ M. Uliasz rightly distinguishes between a complaint about a bailiff’s omission and a complaint about other negative decisions made by a proceeding body such as dismissal or refusal of a claim, which, unlike a bailiff’s omission, should be classified as the body’s acts (action).⁴ The possibility of appealing against those decisions is discussed below.

2. THE CONCEPT OF OMISSION

The provision of Article 767 §1 sentences 1-2 CCP regulates *expressis verbis* admissibility of appealing by way of a complaint about a bailiff’s conduct consisting in the performance of action (not necessarily enforcement action) or about omission to take specified action. It can be added that a “complaint about omission” is not applicable in case of another type of an executive body’s (court’s) omission to take action. Therefore, a statement that “an executive body’s omission to take action may also be subject to a complaint” is imprecise.⁵

Further comments require explanation of the concept of a bailiff’s omission, which is a starting point to further considerations concerning the differentiation between a bailiff’s omission and refusal to take action or this executive body’s inaction. The judicature emphasises that omission means neglect of duty to engage in additional activities in the course of the initiated enforcement action that should be performed in order to protect the rights of the parties or third persons, e.g. failure to perform an obligation to seize the revealed property of a debtor that is subject to enforcement action for the benefit of persons entitled to alimony, or failure to appoint a custodian in the circumstances of mortgage pursuant to Article 855 §1 CCP.⁶ The justification of one of the rulings of the Supreme Court suggests that omission may consist, *inter alia*, in a bailiff’s failure to take enforcement action and to inform a creditor about the state of the case, which constitutes the violation of the norms of the formalised executive procedure.⁷ There is also a stand that every instance of partial or total failure

³ A. Cudak, *Skarga na czynności...*, pp. 73–74; M. Uliasz, [in:] J. Ignaczewski (ed.), *Komentarz do spraw z zakresu postępowania zabezpieczającego i egzekucyjnego*, Warsaw 2013, p. 214.

⁴ M. Uliasz, [in:] J. Ignaczewski (ed.), *Komentarz do spraw z zakresu...*, p. 214.

⁵ D. Olczak-Dąbrowska used this term, see also *Skarga na czynności komornika – efektywny instrument nadzoru judykacyjnego czy narzędzie blokowania egzekucji przez dłużników?*, Warsaw 2014, p. 7.

⁶ Judgement of the Supreme Court of 14 June 1973, I CR 250/73, OSNCP 1974, No. 6, item 110 with a gloss by K. Korzan, OSP 1975, issue 1, item 1. Similarly, Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa w Polsce*, Sopot 2007, p. 191.

⁷ Judgement of the Supreme Court of 5 February 2014, V CSK 166/13, Legalis.

to perform a sufficiently defined regulatory obligation may be recognised as omission.⁸ Administrative courts' case law also indicates that omission to take action consists in the fact that a bailiff neglects the duty to engage in a certain activity, which he is clearly obliged to do by the law (e.g. failure to perform a duty to inform a debtor about the initiation of enforcement action and failure to seize the debtor's revealed property).⁹

Analysing the stand of the doctrine, it is worth referring to the comment by J. Jankowski, who emphasised that the concept of omission was discussed as early as the period when CCP of 1932 was in force.¹⁰ This author referred to J. Korzonek's opinion at the time that a bailiff's omission consists in his giving up activities necessary to protect the rights of the parties or third persons.¹¹ E. Wengerek stated that omission means a bailiff's neglect of duties violating the rights of the parties or third persons.¹² At present, it is added that a bailiff's omission to take action referred to in Article 767 §1 CCP cannot be identified with this body's conduct leading to delay in the executive proceedings, and thus such conduct that is manifestation of the lack of conscientious and timely performance of a bailiff's duties.¹³

In D. Zawistowski's opinion, omission referred to in Article 767 §1 CCP takes place when, regardless of a bailiff's duty to engage in an activity resulting from the provisions concerning the procedure, he does not undertake it and the activity is essential from the point of view of the parties to the proceedings or third persons, e.g. omission to notify a debtor about the initiation of executive proceedings.¹⁴ Making comments on the presented stand, it is necessary to assume *a contrario* that a complaint about a bailiff's omission is inadmissible when a bailiff does not take action that he is obliged to take in the light of the provisions of CCP, but the activity is not essential from the point of view of the rights of the parties or third persons.¹⁵ A doubt arises as well whether, in the light of the presented framework of the definition of omission, one can speak about omission in a situation when a bailiff did not take action that he was not required by

⁸ Judgement of the Appellate Court in Białystok of 23 November 2011, I ACa 501/11, Legalis.

⁹ Ruling of the Voivodeship Administrative Court in Wrocław of 14 March 2014, IV SO/Wr 6/14, <http://www.orzeczenia-nsa.gov.pl> [accessed on 12/10/2017].

¹⁰ See, Announcement of the Ministry of Justice of 1 December 1932 on the promulgation of the uniform text of the Code of Civil Procedure, Journal of Laws [Dz.U.] No. 112, item 934.

¹¹ J. Korzonek, *Postępowanie egzekucyjne i zabezpieczające – Komentarz*, Vol. I, Kraków 1934, p. 354 ff, after J. Jankowski, [in:] K. Piasecki (ed.), *Kodeks postępowania cywilnego. Komentarz*. Vol. II, Warsaw 2002, p. 990.

¹² E. Wengerek, *Sądowe postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 1978, p. 132.

¹³ M. Ślادkowski, *Skarga na czynności komornika w praktyce sądowej*, MoP No. 18, 2014, p. 984 ff.

¹⁴ D. Zawistowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania cywilnego*, Vol. IV: *Artykuły 730–1217*, Warsaw 2014, p. 170. F. Zedler and Z. Szczurek define omission in a similar way, drawing attention to indispensability of an action to protect the rights of the parties, third persons and other participants of the proceedings that a bailiff has failed to take, see Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 191; F. Zedler, *Dopuszczalność skargi na czynności komornika*, *Palestra* No. 12, 1987, p. 14.

¹⁵ Here, reference can be made to Z. Szczurek's statement. He believes that a complaint about a bailiff's action can cover only the action that is related to the legal sphere of parties or other participants of executive proceedings. A bailiff's real action that does not affect the legal situation of these entities is not subject to appeal by way of a complaint – by this author, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 191.

the law and might lead to the violation of the rights of a party or a third person.¹⁶ The above-mentioned construction of the concept of omission proposed in the doctrine, through an obligatory conjunction of two events, i.e. a bailiff's failure to take action required by the law and the violation of, and probably also a threat to, the rights of the parties or third persons, may raise the above-mentioned doubts concerning the semantic scope of the concept of omission. Therefore, it is worth mentioning here that questioning the requirement of the influence of a substrate (which is a bailiff's omission) of a complaint on the legal sphere of the parties, other participants of the proceedings and third persons, the provision of Article 767 §2 CCP imposes clear requirements in this area. One of the conditions of admissibility of a complaint about a bailiff's omission is that it is demonstrated there is a legal interest in filing a complaint measure (*gravamen*, in German: *Beschwer*).¹⁷ Thus, the conditions of admissibility of a complaint measure should be differentiated from the semantic scope of the concept of omission.

In the light of the above comments, it is worth referring to a definition of omission developed by A. Marciniak, who stated that omission is a bailiff's conduct consisting in failure to take enforcement action that he is obliged to take by statute. This author presented examples of a bailiff's failure to perform a duty to deliver a debtor a notification of the initiation of executive proceedings together with the content of the enforcement title and the information about the method of the executive proceedings during the first enforcement activity (Article 805 CCP), failure to appoint a custodian of movable property (Article 855 CCP), failure to notify a debtor of the term and place of auction (Article 867 §3 and Article 855 CCP), and failure to hear the parties before suspension or discontinuance of the executive proceedings (Article 827 CCP).¹⁸ There are more examples of a bailiff's omission to take action indicated in the literature, e.g. failure to hear the parties when a custodian is changed (Article 860 CCP),¹⁹ omission to issue a decision on discontinuance of executive proceedings *ex officio* (Article 824 CCP),²⁰ failure to appoint an expert witness in spite of a complaint filed in connection with the challenged bailiff's quotation of the real estate value (Article 853 §2 CCP),²¹ or failure to meet a four-day time limit for transferring executed liabilities to the entitled party

¹⁶ Following A. Marciniak, it should be assumed that taking action by a bailiff in accordance with the provisions of the law, although it violates the rights of parties, is not subject to complaint but should be fought against via anti-enforcement litigation – by this author, *Postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 2005, p. 140. An appeal against omission results from the lack of a bailiff's action required by statute. The lack of a bailiff's action violating the rights of parties is not subject to appeal by way of a complaint in the event it is not required by statute.

¹⁷ For more, see: W. Broniewicz, *Dopuszczalność środków odwoławczych w postępowaniu cywilnym ze względu na przedmiot zaskarżenia*, PiP No. 5, 1997, p. 19; S. Włodyka, *Interes prawny jako przesłanka dopuszczalności zaskarżenia orzeczeń w procesie cywilnym*, NP No. 9, 1963, p. 927 ff; A. Wilczyńska, *Interes prawny i jego granice w postępowaniu cywilnym*, Paestra No. 9–10, 2010, p. 31 ff; T. Ereciński, [in:] J. Gudowski (ed.), *System Prawa Procesowego Cywilnego*, Vol. III: *Środki zaskarżenia*, part 1, Warsaw 2013, pp. 98–100.

¹⁸ A. Marciniak, *Postępowanie egzekucyjne...*, p. 140. Since 8 September 2016, the hearing referred to in Article 827 §1 CCP has been optional.

¹⁹ A. Różalska, *Skarga na czynności komornika*, PES No. XVIII, 1996, p. 26.

²⁰ D. Olczak-Dąbrowska, *Skarga na czynności komornika...*, p. 7.

²¹ A. Cudak, *Skarga na czynności...*, p. 73 ff.

(Article 22 ACBEP).²² Pursuant to the wording of Article 865 §1 CCP before the amendment of 29 August 1997,²³ it was recognised that a bailiff's omission occurred when he failed to deliver seized unused movable property to appropriate entities of cooperative trade for sale.²⁴

A terminological comment can be made in connection with the above-mentioned definition of omission. It concerns the explanation whether a bailiff's omission consists in failure to take "enforcement action" or probably it would be better to use the term "action". The issue refers to the fundamental problem of admissibility of a complaint about a bailiff's action. It should be taken into consideration that the provision of Article 767 §1 sentence 1 *in principio* CCP lays down the right to a complaint about "a bailiff's action" to a regional court. General provisions concerning the issue of executive bodies, their features and procedure in general, however, stipulate that it is regional courts and their bailiffs' competence to conduct "executive cases" (Article 758 CCP), and bailiffs take "enforcement action" with the exception of action reserved for courts (Article 759 §1 CCP). Thus, the terminology used by the legislator in the regulations on the court executive procedure is not uniform. The issue of the meaning of the above-mentioned phrases has already been the subject of doctrinal considerations. However, it is necessary to return to this issue in order to define the meaning of the concept of omission.

In accordance with Article 2(1) ACBEP, only a bailiff takes "enforcement action" in civil cases, unless otherwise laid down in statute. A bailiff also takes other types of "action" pursuant to other regulations. The concept of "enforcement action" does not have a uniform definition in jurisprudence, and the differences concern the point of reference of a bailiff's action, i.e. the objective aspect of the definition. There is an opinion that enforcement action means activities performed by executive bodies that are competent to deal with executive cases (Article 758 CCP) if they can cause legal consequences in a particular executive case.²⁵ The consequences of enforcement action defined with regard to the form, place and time of performance are also referred to the executive procedure,²⁶ thus *in abstracto*, not to a particular executive case. It worth emphasising that the concept of enforcement action is also understood as executive bodies' action (Article 759 CCP) performed in the course of the proper executive proceedings and being its consequence in distributing proceedings.²⁷

Next, it is necessary to point out that executive proceedings do not mean the same as the concept of enforcement action. Enforcement action is taken only within

²² D. Zawistowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania...*, p. 170. Act of 29 August 1997 on court bailiffs and enforcement procedure, uniform text, Journal of Laws [Dz.U.] of 2017, item 1277 as amended, hereinafter referred to as ACBEP.

²³ Article 95(7) ACBEP, Journal of Laws [Dz.U.] No. 133, item 882, which entered into force on 30 November 1997. In the present legal circumstances, the delivery of the movable property for sale is optional and depends on a party's motion.

²⁴ F. Zedler, *Dopuszczalność skargi...*, p. 14.

²⁵ W. Siedlecki, *Komentarz do kodeksu...*, p. 1080; E. Wengerek, *Postępowanie zabezpieczające i egzekucyjne. Komentarz*, Warsaw 1994, p. 36; Z. Świeboda, *Pojęcie i rodzaje czynności egzekucyjnych sądu*, Palestra No. 10, 1976, p. 4; H. Mądrzak, *Czynności egzekucyjne (analiza pojęć)*, Zagadnienia egzekucji sądowej w Polsce No. 3, 1994, p. 106 ff.

²⁶ H. Pietrzkowski, [in:] T. Erciński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. V: *Postępowanie egzekucyjne*, Warsaw 2016, p. 29.

²⁷ A. Marciniak, *Postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 2008, pp. 82–83.

executive proceedings. In the course of executive proceedings, other activities may be performed but they are not enforcement action. In other words, executive proceedings serve the performance of enforcement action, meaning all coercive measures typical of a particular type of enforcement action that an executive body may use in a particular sequence within the method of enforcement action chosen by a creditor in order to satisfy the creditor's claims, in accordance with the content of the enforcement title.²⁸ The executive proceedings, on the other hand, are the organised action of executive bodies in cooperation with entities involved that are aimed at effective enforcement of a given legal norm established in the enforcement title and, with the use of coercive measures, obtaining a debtor's liabilities owed to a creditor.²⁹

Z. Szczurek assumed that a bailiff's action analysed in the context of admissibility of a complaint under Article 767 §1 CCP should always be defined within the framework of carried out enforcement action, with full awareness of the fact that not all the activities performed by a bailiff constitute enforcement action.³⁰ Therefore, every executive activity performed by a bailiff within enforcement action is undoubtedly subject to a complaint. A. Cudak rightly noticed, however, that also some other types of a bailiff's action are subject to a complaint: firstly, those activities that are not enforcement ones because they are performed before a bailiff initiates enforcement (e.g. call for advance payment); secondly, activities performed by a bailiff without the initiation of enforcement (e.g. return of an application to initiate enforcement in case a debtor did not eliminate defects in the document); and thirdly, a bailiff's activities performed within executive proceedings but after the enforcement (e.g. rulings concerning costs of the proceedings).³¹

The above-presented considerations lead to a conclusion that a complaint about a bailiff's action referred to in Article 767 §1 CCP is admissible in case a bailiff takes action, which is a broader term and does not always mean the same as the concept of "enforcement action". Therefore, "a bailiff's action" is subject to appeal by way of a complaint and enforcement action constitutes a type of activities this executive body undertakes in the course of enforcement. Moreover, it should be emphasised that also a bailiff's activities other than those undertaken in executive proceedings may be appealed against by way of a complaint. As A. Cudak rightly noticed, all the activities undertaken by a bailiff as an executive body, other activities under executive proceedings and all other activities undertaken by him in accordance with statutory provisions may be subject to a complaint.³² The above comments on the semantic

²⁸ R. Kowalkowski, [in:] *Encyklopedia egzekucji sądowej*, Sopot 2002, p. 61. Enforcement constitutes a process serving the implementation of substantive law norms, see S. Gołąb, Z. Wusatowski, *Kodeks postępowania cywilnego, część druga*, Kraków 1933, p. 1; P. Cioch, J. Nowińska, *Postępowanie cywilne*, Warsaw 2007, pp. 373–374.

²⁹ Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 31; S. Dalka, *Podstawy postępowania cywilnego*, Sopot 1999, p. 47.

³⁰ Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 31. Z. Świeboda expressed an opinion referring enforcement action to executive bodies' activity in the course of enforcement, see by this author *Pojęcie i rodzaje...*, p. 4.

³¹ A. Cudak, *Skarga na czynności...*, pp. 54–55.

³² A. Cudak, *ibid.*, p. 56. The concept of "a bailiff's action" that can be subject to complaint should be understood in a broad way, referring not only to enforcement action, compare, I. Gil, [in:] E. Marszałkowska-Krześ (ed.), *Postępowanie cywilne, Meritum*, Warsaw 2017, p. 1365.

scope of the concept of a bailiff's action, which as that executive body's active action is subject to appeal by way of a complaint, should be referred to as a bailiff's omission to take action. *Interpretatio declarativa* of Article 767 §1 sentences 1–2 CCP indicates that the legislator used the concept of "a bailiff's action" in the same sense in relation to admissibility of appeal against both active and passive conduct of this executive body. In accordance with the principle *lege non distinguente nec nostrum est distinguere*, the interpretation of the substrate of a complaint about "a bailiff's action" in the event of an appeal against his action and omission should be the same.

It is worth asking another question about the source of the requirement that a bailiff should take action which this body has failed to perform. The issue is important due to the fact that one of the doctrinal definitions of a bailiff's omission interprets the subject of a complaint about a bailiff's omission as a bailiff's failure to take action he is obliged to take,³³ without the indication of the source of this obligation. The problem concerns establishing whether it is a statutory provision or perhaps a concerned entity's motion that is the source of the requirement for a bailiff's action. In other words, it is worth determining whether a complaint about a bailiff's omission is applicable in case a bailiff fails to take action that a party to executive proceedings or another entity authorised to complain under Article 767 §1 CCP has requested but a bailiff has not been obliged by statute to undertake. It should be recognised that omission occurs when a bailiff's duty to take action results from the provisions of CCP or other statutory regulations. As O. Marcewicz rightly stated, a bailiff's omission is neglect of duty to take action to which a statutory provision clearly obliges him. Other conduct of this body, e.g. failure to take action requested by a creditor, constitutes an executive body's inaction.³⁴

In the light of the above-presented considerations, taking into account the universal nature of a complaint about a bailiff's action,³⁵ omission should be defined as a bailiff's conduct consisting in failure to take enforcement action to which he is obliged by a particular statutory provision.

³³ I. Gil adopted the definition, see also, [in:] *Postępowanie cywilne...*, p. 1366.

³⁴ O. Marcewicz, [in:] A. Jakubecki (ed.), *Kodeks postępowania cywilnego*, Vol. II: *Komentarz do art. 730–1217*, Warsaw 2017, p. 149.

³⁵ It is applicable *inter alia* in protective proceedings to secure claims (compare, Article 743 §1 CCP as well as the Resolution of the Supreme Court of 22 September 1995, III CZP 117/95, OSNC 1995, No. 12, item 179 and the Judgement of the Supreme Court of 26 January 2001, II CKN 366/00, MoP No. 7, 2005, p. 348). Also in the proceedings to secure an inheritance, to change a measure of securing claims or to take inventory, the provisions of Articles 759–774 CCP are applied respectively (compare, Article 638² §4 CCP and I. Kunicki, [in:] W. Broniewicz, A. Marciniak, I. Kunicki (ed.), *Postępowanie cywilne w zarysie*, Warsaw 2016, p. 444.). The Regulation of the Minister of Justice of 15 October 2015 on some activities performed in the course of securing an inheritance (Journal of Laws [Dz.U.] of 2015, item 1643) does not contain autonomous grounds for filing complaints about a bailiff's action as it was under the force of the former wording of this regulation repealed on 18 October 2015. Moreover, a complaint is applicable in relation to a bailiff's action under Article 1051 §3 and Article 1057 §1 CCP in the event when not a bailiff but a court is an executive body. On the other hand, it should be emphasised that the special nature of a complaint about a bailiff's action is generally expressed in its admissibility in relation to a bailiff's conduct as an executive body; compare, H. Pietrkowski, [in:] T. Ereciński (ed.), *Kodeks postępowania...*, p. 58.

3. BAILIFF'S OMISSION TO TAKE ACTION VS INACTION

A complaint about a bailiff's omission to take action should be distinguished from a complaint about inaction.³⁶ The provision of Article 767 §1 CCP *expressis verbis* regulates a complaint about a bailiff's activities that are admissible when he takes action as well as when he fails to take action. There is no right to make a complaint about a bailiff's activities under Article 767 §1 CCP in case of a bailiff's inaction.³⁷ As early as on 14 June 1973, the Supreme Court issued its Judgement I CR 250/73, in which it expressed an opinion that the term "omission" used in Article 767 §1 sentence 2 CCP does not cover the term inaction leading to the lengthiness of the proceedings, which is not subject to a complaint about a bailiff's action or to any other legal measure.³⁸ The problem of inadmissibility of a complaint about a bailiff's inaction has already been a subject matter of doctrinal discussions.³⁹ However, the differentiation of designates that correspond to the concepts of a bailiff's "inaction" and "omission" remains a problem that is still up-to-date, regardless of the flow of time.

As far as the explanation of the concept of a bailiff's inaction is concerned, it is necessary to refer to the definition developed in case law, which assumes that a bailiff's inaction is expressed not in his failure to perform duties laid down in statute but in conduct other than a bailiff's omission, e.g. failure to take any action in the case or failure to perform activities requested by a creditor. A bailiff's inaction is non-compliance with obligations under Article 45a ACBEP.⁴⁰ Pursuant to the wording of this provision, a bailiff must without delay, not later than in the period of seven days from the date of the receipt of a creditor's motion, take action necessary to efficient enforcement or protection of claims, including a European Account Preservation Order. Therefore, in order to establish a bailiff's inaction, it is essential to establish the lack of whatever action on his part, interpreted as positive conduct (lack of action that is not omission). It is assumed in the doctrine that the concept of a bailiff's inaction in the context of Article 23(1) ACBEP also covers this body's sluggishness, which together with unlawfulness obliges a bailiff and

³⁶ F. Zedler, *Dopuszczalność skargi...*, p. 14.

³⁷ K. Flaga-Gieruszyńska, [in:] A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2017, p. 1357. In this context, M. Uliasz's opinion is unclear. In one work, although he differentiates a bailiff's omission from his inaction, he states that: "a complaint is an appeal measure applicable in relation to a bailiff's action as well as inaction"; by this author, *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2008, p. 1123. Also see, the Ruling of the District Court in Toruń 18 October 2013, VIII CZ 593/13, <http://www.orzeczenia.torun.so.gov.pl> [accessed on 12/10/2017], in which the court decided that a complaint about a bailiff's action is applicable also in the event of his inaction, i.e. failure to take a decision adequate to circumstances (Article 767 §1 sentence 2 CCP).

³⁸ OSNCP 1974, No. 6, item 110.

³⁹ A. Laskowska, *Przyznanie odpowiedniej sumy pieniężnej wskutek uwzględnienia skargi na przewlekłość postępowania egzekucyjnego*, PPE No. 9, 2007, p. 11 ff and the literature referred to therein; Z. Szczurek, *Propozycje zmian przepisów k.p.c. regulujących postępowanie zaskarżeniowe w egzekucji*, *Problemy Egzekucji Sądowej* No. XXV, 1997, p. 21.

⁴⁰ Ruling of the Voivodeship Administrative Court in Wrocław of 14 March 2014, IV SO/Wr 6/14, <http://www.orzeczenia-nsa.gov.pl> [accessed on 12/10/2017].

the State Treasury to jointly redress the loss that results from that inaction.⁴¹ In accordance with the provision of Article 23(1) ACBEP, a bailiff is obliged to redress the loss resulting from unlawful action or omission to take action. Thus, a bailiff's inaction should be interpreted as this executive body's lack of conscientiousness and time discipline in the performance of activities. The inaction, understood as a type of neglect, may have its source in simple carelessness or disrespect for obligations imposed by statute on a bailiff as a basic executive body.⁴²

Before the presentation of methods of reaction to a bailiff's inaction, it is worth highlighting that it may be subject to non-judicial supervision over a bailiff, which, unlike the judicial supervision, is subjective in nature and addressed directly to a bailiff. Non-judicial supervision is aimed at counteracting lengthiness of the judicial executive proceedings. Thus, inaction is subject to administrative supervision exercised by presidents of regional courts, in accordance with Article 3(2.1) ACBEP, and corporate supervision exercised by bailiffs' self-government in accordance with Article 65(3) ACBEP.⁴³ Pursuant to those regulations, a president of a regional court that a bailiff is affiliated to supervises his activities, inter alia, assessing the pace, efficiency and diligence of executive proceedings by analysing whether undue lengthiness in taking action occurs in particular cases. Promptness and diligence of executive proceedings are also subject to supervision by the National Bailiffs Council (Krajowa Rada Komornicza). Article 6 ACBEP is a specific extension of the above-mentioned corporate supervision of bailiffs⁴⁴ and based on it, bailiffs' self-government bodies are to ensure the maintenance of the high standard of activities performed by bailiffs without interference in the scope of administrative supervision.⁴⁵ A bailiff's inaction, i.e. taking action with undue delay (Article 71(5) ACBEP), also constitutes grounds for a bailiff's disciplinary liability.

Administrative and corporate supervision activities, i.e. non-judicial supervision exercised by a president of a regional court and persons authorised to supervise bailiffs' activities, cannot interfere in the scope of judicial supervision performed in accordance with Article 759 §2 CCP. Application of the measures laid down in this provision is the competence of a court and not a regional court president. Only if necessary, a court president may file a motion to a court to take action under the indicated provision. Irregularities found by a regional court president and persons authorised to supervise bailiffs may constitute grounds for initiating action pursuant

⁴¹ E. Bagińska, J. Prachomiuk, [in:] R. Hauser, A. Wróbel, Z. Niewiadomski (ed.), *Odpowiedzialność odszkodowawcza w administracji. System Prawa Administracyjnego*, Warsaw 2016, p. 479.

⁴² Compare, Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...* According to T. Bukowski, the collection of an advance payment on the cost of enforcement only is a manifestation of a bailiff's inaction; by this author, *Rozstrzygnięcie o kosztach procesu cywilnego*, Warsaw 1971, p. 7 ff.

⁴³ D. Zawistowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania...*, p. 170. The provisions of Articles 79–94a ACBEP regulate bailiffs' self-government and the rules of its operation.

⁴⁴ In accordance with it, bailiffs' self-government bodies deal with complaints about a bailiff's conduct not related to enforcement action and not subject to a regional court president's supervision.

⁴⁵ M. Dziewulska, [in:] J. Świeczkowski (ed.), *Ustawa o komornikach sądowych i egzekucji. Komentarz*, Warsaw 2012, p. 50.

to Article 759 §2 CCP *ex officio*.⁴⁶ It is indicated in jurisprudence that a complaint about inaction should be treated as a motion to take action by a regional court president who is a body responsible for providing administrative supervision of bailiffs.⁴⁷ However, it is not appropriate to fight against a bailiff's inaction by way of appeal measures or other non-statutory legal measures available in the judicial executive proceedings.

As far as the consequences of a bailiff's inaction are concerned, it is worth mentioning that inaction, which is different from omission to take action, in general leads to lengthiness of the judicial executive proceedings.⁴⁸ Lengthiness of the judicial executive proceedings⁴⁹ is subject to a complaint regulated in separate provisions, i.e. the Act of 17 June 2004 on the complaint about the violation of parties' right to a hearing in preparatory proceedings conducted or supervised by a prosecutor and in judicial proceedings without an undue delay (Article 1(2) of the Act).⁵⁰ Before the Act entered into force, it was assumed in jurisprudence that lengthiness of executive proceedings justifies taking action within administrative supervision of bailiffs exercised by a regional court president.⁵¹ However, inaction of a bailiff as an executive body does not constitute grounds for discontinuation of executive proceedings *ex officio*.⁵²

To finish this thread of thought, it is worth emphasising again that the distinction between the semantic scope of a bailiff's omission and inaction is not easy. The problem concerns in particular creditors who, often misunderstanding legal language terms, make use of inadmissible *in concreto* legal measures. Z. Szczurek, supporting changes in the regulations of a complaint about a bailiff's action, noticed this doctrinal problem. He drew attention to the construction of a complaint about a bailiff's activities in the context of a proposal to speed up executive proceedings. He emphasised the fact that the juridical distinction between the concepts of a bailiff's "omission" and "inaction" is not in the interest of a creditor who is only interested in fast and efficient enforcement. From a creditor's point of view, the consequences of a bailiff's omission and inaction are the same. Therefore, in this author's opinion, it is justified that pursuant to Article 767 CCP, it should be admissible to file a complaint about a bailiff's inaction.⁵³ However, one should be really careful when considering this proposal. It seems that, especially in the

⁴⁶ Compare, J. Jankowski, [in:] K. Piasecki (ed.), *Kodeks postępowania...*, p. 990; F. Zedler, *Dopuszczalność skargi...*; Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 191. See also, the provisions of Article 3(2.4) and Article 65(4) ACBEP.

⁴⁷ I. Gil, [in:] E. Marszałkowska-Krześ (ed.), *Postępowanie cywilne...*, p. 1366.

⁴⁸ K. Korzan, *Sądowe postępowanie zabezpieczające...*, p. 201.

⁴⁹ For more on the reasons of lengthiness of executive proceedings, see: D. Olczak-Dąbrowska, *Wybrane zagadnienia egzekucji sądowej*, Instytut Wymiaru Sprawiedliwości, Warsaw 2016.

⁵⁰ Uniform text, Journal of Laws [Dz.U.] of 2016, item 1269 as amended; for more on this complaint, see also: M. Michalska-Marciniak, *Skarga o stwierdzenie przewlekłości postępowania egzekucyjnego*, PPE No. 12, 2007, p. 5 ff; M. Krakowiak, *Skarga o stwierdzenie przewlekłości postępowania egzekucyjnego*, PPE No. 1–6, 2005, p. 19 ff.

⁵¹ K. Korzan, *Sądowe postępowanie zabezpieczające...*, p. 201.

⁵² Ruling of the Supreme Court of 25 June 2015, III CZP 39/15, OSNC 2016, No. 6, item 77.

⁵³ Z. Szczurek, *Propozycje zmian przepisów...*, p. 31.

context of speeding up the executive proceedings, the extension of admissibility of a complaint under Article 767 §1 CCP would have consequences different from intended. The introduction of a new substrate of a complaint (about a bailiff's inaction) might also lead to actual threat of abuse of procedural law.

4. BAILIFF'S OMISSION VS REFUSAL TO TAKE ACTION

It is also indicated in the literature and case law that it is admissible to appeal by way of a complaint about a bailiff's action as this executive body's conduct consisting in refusal to take action necessary to perform enforcement.⁵⁴ In the Resolution of 26 February 1969, III CZP 131/68, the Supreme Court stated that a debtor has the right to complain about a bailiff's refusal to quash the judicial seizure of claims.⁵⁵ The assumption of admissibility of an appeal by way of a complaint under Article 767 §1 CCP about a bailiff's refusal to take action caused that the doctrine recognised this complaint as similar to another measure of legal protection, i.e. a complaint about refusal to take notary action (called a complaint about a notary)⁵⁶ laid down in Article 83 of the Act of 14 February 1991: Law on notarial services.⁵⁷

However, in Article 767 §1 CCP, the legislator does not distinguish a separate substrate of a complaint about a notary's action in the form of a notary's refusal to take action. The legislator only regulates a complaint about a notary's action and omission to take action. A complaint about a notary's refusal to take action was laid down *expressis verbis* in the provision of §2(2) sentence 3 of the Regulation of the Minister of Justice of 1 October 1991 on detailed mode of proceedings in securing an inheritance and taking inventory⁵⁸ applicable in non-litigious proceedings, which was repealed a few years ago. The provision directly stipulated that a complaint might also be filed in case of the refusal to take action.

Although it is justifiable to admit a complaint about a notary's refusal to take action, there is a problem with classification of the legal grounds for the measure with the so determined appeal substrate. It is highlighted in the doctrine that the matters subject to complaint under Article 767 §1 CCP include a bailiff's executive action, this body's omission to take action or refusal to take action, e.g. dismissal of a motion to

⁵⁴ Resolution of the Supreme Court of 20 November 2008, III CZP 108/08, OSNC 2009, No. 10, item 139; D. Zawistowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania...*, p. 170; A. Pytel, *Moment ustalenia wysokości wynagrodzenia radcowskiego i adwokackiego w sprawie egzekucyjnej*, MoP No. 18, 2017, p. 1006; Z. Szczurek, *Propozycje zmian przepisów...*, p. 22; B. Bładowski, *Dopuszczalność środków zaskarżenia w sprawach egzekucyjnych*, Palestra No. 5–6, 2014, p. 150.

⁵⁵ OSNCP 1969, No. 9, item 156.

⁵⁶ See, P. Telenga, *Skarga na czynności komornika (zagadnienia wybrane związane z rozstrzygnięciem skargi przez sąd rejonowy)*, [in:] M. Michalska-Marciniak (ed.), *Wokół problematyki środków zaskarżenia w postępowaniu cywilnym*, Sopot 2015, p. 457.

⁵⁷ Uniform text, Journal of Laws [Dz.U.] of 2016, item 1796.

⁵⁸ Journal of Laws [Dz.U.] of 1991, No. 92, item 411; the Regulation was in force until 17 October 2015. Its provisions made a complaint admissible in two situations, i.e. about a bailiff's action and refusal to take action.

suspend the proceedings.⁵⁹ However, a question arises whether a bailiff's refusal to take action is a separate subject to appeal. A positive answer to this question, however, may raise objections with regard to the need to introduce, and thus differentiate, three substrates of the appeal, i.e. a bailiff's action, omission to take action and refusal to take action. However, a bailiff's refusal to take action is something different from his omission to take action. Making use of the considerations presented above concerning referents of the concept of omission, it is not possible to classify a bailiff's refusal to take action as one of them. Refusal to take action is an executive body's decision preceded by a substantive assessment of the filed motion⁶⁰ or may also result from the fact of failure to pay a fixed fee, which is directly referred to in Article 49a(2) ACBEP.

Not questioning admissibility of a complaint about a bailiff's refusal to take action, e.g. a bailiff's decision on refusal to make an additional description and quotation (Article 951 CCP), refusal to issue an executive proceeding discontinuation certificate (Article 827 §2 CCP) or refusal to discontinue executive proceedings (Article 825(1) CCP), it should be admitted that the right to file a complaint about such a substrate of appeal results from the general rule under which a complaint about a bailiff's action operates. This complaint serves the control of every indication of a bailiff's action with respect to this conduct compliance with the binding provisions.⁶¹ One of the reflections of a bailiff's conduct about which a complaint is admissible may be refusal to take action. A bailiff's negative attitude to a request to take action certainly cannot be treated as this executive body's omission to take action. Thus, it seems right to believe that a bailiff's refusal to take action is subject to appeal pursuant to Article 767 §1 sentence 1 CCP. Refusal to take action, on the other hand, belongs to referents of the concept of "a bailiff's action" discussed in the above-mentioned provision. It should be assumed that the broadly understood concept of "a bailiff's action" concerns every conventional activity performed by a bailiff, regardless of its content, the consequences of which, determined by the binding legal order, violate or endanger the rights of a party to the executive proceedings or another person. As it has been indicated above, the requirement of taking action must result from statute. However, a bailiff's refusal to take action cannot be treated as separate grounds for appeal because the legislator has not laid down such legal grounds for appeal.⁶² It should be assumed that a bailiff's refusal to take action is an executive body's "action" referred to in Article 767 §1 sentence 1 *in principio* CCP aimed at having a legal effect that can trigger a legal right to appeal against it.

⁵⁹ D. Olczak-Dąbrowska, *Skarga na czynności komornika...*, p. 7. On appeal by way of a complaint about a bailiff's decision to suspend proceedings, see also K. Kazmierczak, [in:] A. Marciniak, M. Michalska-Marciniak (ed.), *Metodyka pracy komornika sądowego*, Sopot 2015, p. 424. T. Demendecki expressed a similar opinion stating that a complaint is applicable in relation to every "activity of a bailiff (...) and omission or refusal to take action", see by this author, *Tryb wnoszenia, forma i treść skargi na czynności komornika sądowego*, [in:] J. Misztal-Konecka (ed.), *Środki zaskarżenia w sądowym postępowaniu egzekucyjnym. Zbiór studiów*, Sopot 2017, p. 34.

⁶⁰ Similarly to the refusal to perform notarial activities.

⁶¹ M. Sorysz, *Projektowane zmiany w Kodeksie postępowania cywilnego – zagadnienia wybrane (Druk nr 2678 Sejmu VII kadencji). Głos w dyskusji*, PPE No. 2, 2015, p. 23.

⁶² One of the requirements of admissibility of every appeal measure is suitability of a given decision (action) with the use of a given appeal measure, see, I. Kunicki, [in:] W. Broniewicz, A. Marciniak, I. Kunicki (ed.), *Postępowanie cywilne...*, p. 315.

5. COMPLAINT ABOUT A BAILIFF'S OMISSION *DE LEGE FERENDA*

Admissibility of a complaint about a bailiff's positive conduct, i.e. performance of action stipulated by statutory provisions, does not raise any objections in the literature. Some comments are only made in relation to the amendments consisting in the addition of Article 767 §1⁶³ CCP.⁶³ Still, recently, some opinions have appeared in jurisprudence questioning admissibility of a complaint about a bailiff's omission. The issue needs explanation. It is worth preceding considerations *de lege ferenda* with a retrospective comment. It can be noted that under ACBEP of 1932, there was no measure of complaint about a bailiff's omission to take action within the executive procedure.⁶⁴ The legislator only laid down a complaint about a bailiff's action in Article 512 §1 ACBEP of 1932. A complaint about a bailiff's omission appeared in the provision of Article 767 §1 sentence 2 CCP that entered into force on 1 January 1965.⁶⁵ However, already in the 1930s and then before the present CCP entered into force, there were proposals *de lege ferenda* to make a complaint about a bailiff's action applicable to omission to take action.⁶⁶ Other reasons for the introduction of a complaint about omission included the requirements for candidates for bailiffs that were not so strict as they are now as well as a different status of a court bailiff then and now.⁶⁷ Therefore, the provision of an appeal measure in case of a bailiff's neglect had a negative effect on the legal situation of this conduct addressee seemed to be a necessity. It appears that the idea of admissibility of a complaint about a bailiff's omission originates from the leading authorities of the scientific circles and the contemporary model of a complaint is still being developed by the doctrinal proposals.

The example of the proposals to take into consideration exclusion of admissibility of a bailiff's omission formulated in jurisprudence confirms this stand. The proposals will be discussed below. They focus on the broadly understood action aimed at objection to the parties' obstructive action. In order to obtain their particular interests, they often use their rights in the way that is not adequate to the aim of the procedural measures laid down by law and violate Article 3 CCP. It is worth mentioning that the legislator, based on the binding CCP, successively undertakes

⁶³ Although the provision was approved of, a negative opinion of A. Antkiewicz can be noted. He believes that it is justifiable to further limit admissibility of a complaint about a bailiff's action; see by this author, *Zmiany w postępowaniu egzekucyjnym w rządowym projekcie nowelizacji Kodeksu postępowania cywilnego zawartym w druku nr 2678 Sejmu VII kadencji*, PPE No. 5, 2015, p. 41.

⁶⁴ A complaint about omission is not laid down in the Code of Civil Procedure – Appendix to the Announcement of the Minister of Justice of 25 August 1950 on promulgation of the uniform text of the Code of Civil Procedure (Journal of Laws [Dz.U.] No. 43, item 394), and Article 519 §1 CCP regulates only a complaint about a bailiff's action.

⁶⁵ Act of 17 November 1964 – Code of Civil Procedure, Journal of Laws [Dz.U.] of 1964 No. 43, item 296.

⁶⁶ J. Korzonek, *Postępowanie egzekucyjne i zabezpieczające...*, p. 354 ff; E. Wengerek, *Postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 1961, p. 104.

⁶⁷ It is worth highlighting that when the present CCP entered into force, the Regulation of the Minister of Justice of 31 December 1960 on bailiffs was binding (Journal of Laws [Dz.U.] of 1961, No. 13, items 65 and 66; the act was repealed on 30 November 1997). The provisions of §§1 and 7 of the Regulation stipulated that a bailiff was a state official appointed to perform executive activities, and the requirement for candidates for bailiff apprentices included, inter alia, secondary education.

steps to broaden the scope of admissibility of a complaint about a bailiff's action. One can recognise the introduction of admissibility of a complaint about a bailiff's omission as a starting point for this tendency. The Act of 2 July 2004 amending the Act: Code of Civil Procedure and some other acts was another important step.⁶⁸ The amendment let the legislator introduce the possibility of filing a complaint by a party or another person in the event a bailiff's action or its omission violates or endangers their rights (Article 767 §2 CCP). The only amendment to a complaint about a bailiff's action that reduced the scope of admissibility of that complaint was introduced in the Act of 10 July 2015 amending the Act – Civil Code, the Act – Code of Civil Procedure and some other acts.⁶⁹ Pursuant to it, the legislator added the provision of Article 767 §11 CCP,⁷⁰ which excludes a complaint with regard to enumerated bailiff's activities constituting only a stage of proceedings that ends with another activity which can be subject to appeal.

Referring to the key proposals *de lege ferenda*, it is worth considering the justifiability of a complaint about a bailiff's omission to take action. M. Sorysz proposed to give up a complaint about a bailiff's omission to take action. This author noticed that a complaint about omission to take action was inadmissible in committal proceedings. However, a court president's supervision and a complaint about lengthiness of proceedings, which can successfully protect the rights of the parties that are affected by a bailiff's omission (this does not refer to inaction),⁷¹ may constitute a disciplining element. A problem that arises in relation to the above proposal concerns, inter alia, the establishment whether a complaint about a bailiff's omission is just a legal instrument thanks to which a potential complainant may demand that a bailiff take specific action. It seems that it does not. One should emphasise the possibility resulting from the application of the dispositive part of the provisions laid down in Article 760, Article 763, Article 799 §1 sentences 2 and 3 or Article 801 CCP. In jurisprudence, Z. Knypl emphasises a creditor's obligation expressed in the necessity of his participation in the whole executive proceedings. The examples of that activity should include a creditor's motions and requests, participation in activities and providing a bailiff with necessary explanation.⁷²

⁶⁸ Journal of Laws [Dz.U.] No. 172, item 1804. For more on the issue, see: H. Pietrkowski, *Skarga na czynności komornika po zmianach przepisów Kodeksu postępowania cywilnego dokonanych w latach 2004–2015*, PPC No. 3, 2016, p. 477 ff; M. Sorysz, *Nowy system środków zaskarżenia w postępowaniu egzekucyjnym w świetle nowelizacji k.p.c. z 2.7.2004 r.*, MoP No. 2, 2005, p. 74.

⁶⁹ Journal of Laws [Dz.U.] of 2015, item 1311, the Act entered into force on 8 September 2016.

⁷⁰ In accordance with its wording, a complaint is not applicable in relation to a bailiff's ruling to summon a party to complete documents, the notification of the time of action and the payment of VAT. For more on the issue, see: G. Julke, *Skarga na czynności komornika po zmianach przepisów Kodeksu postępowania cywilnego*, [in:] A. Marciniak (ed.), *Sądowe postępowanie egzekucyjne. Zasadnicze kierunki zmian z 2016 roku*, Sopot 2017, p. 281 ff; Ł. Zamojski, *Skarga na czynność komornika sądowego po nowelizacji Kodeksu postępowania cywilnego dokonanej ustawą z 10.7.2015 r.*, MoP No. 21, 2016, p. 1138; A. Antkiewicz, *Zmiany w postępowaniu egzekucyjnym w świetle rządowej noweli Kodeksu postępowania cywilnego zawartej w druku nr 2678 Sejmu VII kadencji*, [in:] I. Kunicki, A. Antkiewicz (ed.), *Ku lepszemu prawu – dyskurs nauki i praktyki. Uwagi na tle ostatnich zmian legislacyjnych w zakresie prawa cywilnego i procedury cywilnej*, Sopot 2015, p. 139.

⁷¹ M. Sorysz, *Projektowane zmiany w Kodeksie...*, pp. 29–30.

⁷² Z. Knypl, [in:] Z. Szczurek (ed.), *Encyklopedia egzekucji sądowej*, Sopot 2002, p. 738.

Determining the relationship between a creditor and a bailiff, Z. Szczurek used an even further-reaching concept of a principle of cooperation between a creditor and a bailiff,⁷³ although it seems that it is more adequate to use the “proposal of cooperation” of the two entities in this context.

Returning to the main issue, it is necessary to draw attention to the consequences of a bailiff’s valid omission to take action. However, as M. Uliasz points out, a bailiff’s omission to take action leading to stabilisation of the legal situation of an entity affected by that omission does not result in irreversible legal consequences. The entity concerned may file a motion with a bailiff to take action and appeal against a bailiff’s negative decision issued after the examination of the motion.⁷⁴ A complaint about refusal to take action also starts a court’s supervision proceedings *ex officio* within the judicial supervision procedure pursuant to Article 759 §2 CCP. The mode can be used to eliminate the consequences of a bailiff’s omission to take action.

According to M. Uliasz, admissibility of a complaint about a bailiff’s omission to take action leads to accelerating and de-formalising executive proceedings. Thus, it seems that this author notices in this specific appeal measure a legal instrument that is desired and adequate to the aim, which a complaint about a bailiff’s action is to serve. This author indicates, however, two ways of challenging the circumstances in which a bailiff fails to take necessary action. Firstly, it is filing a motion with a bailiff to take action. In the event a bailiff refuses to take action, the entity concerned is entitled to a complaint about the circumstance. Secondly, there is an alternative solution: filing a motion with a court to issue a decision eliminating the irregularities noticed in accordance with Article 759 §2 CCP.⁷⁵ Therefore, it does not seem that, under the current legal state, the elimination of a complaint about omission leads to significant limitation of the level of legal protection guaranteed to the parties and other entities authorised to file a complaint that are referred to in Article 767 §2 CCP. However, taking into account that the institution of judicial supervision exercised by a court should be exceptional in nature and applied only in case the initiative of entities affected by a bailiff’s action or omission fails to occur, it is worth referring to a very important judicial opinion. The resolution of seven judges of the Supreme Court of 12 January 1988, III CZP 59/87,⁷⁶ constituting a legal principle, presents a stand that the provision of Article 759 §2 CCP authorises a court, which is a supervisory body, to far-reaching interference into the executive proceedings performed by a bailiff. However, it must be remembered that the legal instrument of judicial supervision laid down in Article 759 §2 CCP imposes on a court an

⁷³ Z. Szczurek, *Egzekucja sądowa w sprawach cywilnych. Część ogólna*, Sopot 2005, p. 40.

⁷⁴ M. Uliasz, [in:] J. Ignaczewski (ed.), *Komentarz do spraw...*, p. 211.

⁷⁵ *Ibid.*, p. 215.

⁷⁶ OSNCP 1988, No. 9, item 110. The Supreme Court expressed a similar opinion in the ruling of 12 March 1975, III CRN 456/74, OSPiKA 1976, No. 1, item 8, stating that the provision of Article 759 §2 CCP imposes an obligation on a court to fully use its authority in the field of supervision over executive proceedings. A court’s supervision over executive proceedings may apply not only to the formal but also subjective aspects. At the same time, it should aim to appropriately ensure and protect the rights of a creditor as well as all the other participants of the proceedings.

executive duty to interfere when it learns that such action is required to ensure appropriate enforcement. A complaint about a bailiff's action the justification of which indicates that a bailiff's action or omission violates law should be an "alarm signal" for a court.⁷⁷

6. CONCLUSIONS

Based on the presented analysis, it seems right to state that the legislator has equipped the parties and other entities involved in executive proceedings with a series of legal instruments serving the prevention of negative consequences of a bailiff's omission to take action. A complaint about omission laid down in Article 767 §1 sentence 2 CCP constitutes a direct remedy for the legal situation in which an entity affected by a bailiff's omission is. Taking into consideration the unlimited scope of admissibility of a complaint about a bailiff's action, one should also note that complaints about omission form an appeal measure that is relatively rarely applied in practice.⁷⁸ In the presence of admissibility of other legal instruments indicated above, which can effectively prevent the consequences of omission, the question about the need for a complaint about a bailiff's omission becomes up-to-date. It does not seem, however, that it would be a good direction of change to abandon a complaint about a bailiff's omission to take action. The conclusion is drawn not only based on the stable establishment of this instrument in civil procedure and its over fifty-year-old tradition but also on the lack of a real need to introduce such a revolutionary change to executive proceedings. However, the presented statement does not negate that the measures that may constitute an alternative to so specified substrate of a complaint and have been indicated in the above comments are right. Nevertheless, it seems that other situations create more threats to fast and efficient enforcement. This concerns admissibility of a complaint about a bailiff's action or omission, which can only potentially endanger the rights of parties or other persons, as referred to in Article 767 §2 *in fine* CCP, or still existing omnipotence of a complaint about a bailiff's action understood as this executive body's activity and not omission.

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⁷⁷ Judgement of the Supreme Court of 10 May 1968, I CR 160/68, OSNCP 1969, No. 2, item 34.

⁷⁸ M. Uliasz, [in:] J. Ignaczewski (ed.), *Komentarz do spraw...*, p. 215.

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COMPLAINT ON A BAILIFF'S OMISSION TO TAKE ACTION: SELECTED COMMENTS *DE LEGE LATA* AND *DE LEGE FERENDA*

Summary

A complaint about a bailiff's action is a fundamental appeal measure in the executive proceedings. Pursuant to Article 767 §1 of the Code of Civil Procedure, it is granted *de lege lata* not only with respect to a bailiff's action, but also with regard to this executive body's omission to take action. The term "action" should also be understood as a bailiff's refusal to take action. A complaint is not admissible, however, in the case of a bailiff's inaction. Inaction is understood as a bailiff's excessive delay and negligence in the fulfilment of obligations under Article 45a of the Act on court bailiffs and enforcement procedure. It leads to excessive lengthiness of executive proceedings. A bailiff's inaction should not be *de lege ferenda* subject to complaint under Article 767 §1 sentence 2 CCP. Thus, the pursuit of equating the semantic scopes of the terms "omission" and "inaction" does not deserve approval. This attitude should be upheld, despite the fact that a creditor often believes the effects of a bailiff's omission and inaction are the same. It is also very important to treat with great caution the proposals to abandon a complaint about the bailiff's omission. The effectiveness of enforcement is supported by the recently introduced changes limiting the scope of admissibility of a complaint in relation to active, not passive, bailiff's conduct.

Keywords: bailiff's action, omission, inaction, enforcement, judicial supervision, refusal to take action

SKARGA NA ZANIECHANIE PRZEZ KOMORNIKA DOKONANIA CZYNNOŚCI – WYBRANE UWAGI *DE LEGE LATA* I *DE LEGE FERENDA*

Streszczenie

Skarga na czynności komornika stanowi podstawowy środek zaskarżenia w postępowaniu egzekucyjnym. Z art. 767 §1 k.p.c. wynika, iż *de lege lata* przysługuje ona nie tylko na „czynności” komornika, lecz także na „zaniechanie” tego organu egzekucyjnego. Pod pojęciem czynności należy rozumieć także odmowę dokonania czynności przez komornika. Skarga nie przysługuje jednak w przypadku bezczynności komornika. Bezczynność rozumiana jest jako opieszałość i zaniedbanie komornika w realizacji obowiązków wynikających z art. 45a ustawy o komornikach sądowych i egzekucji. Prowadzi ona do przewlekłości postępowania egzekucyjnego. *De lege ferenda* bezczynność komornika nie powinna podlegać zaskarżeniu w drodze skargi z art. 767 §1 zd. 2 k.p.c. Tym samym dążenia do zrównania zakresu znaczeniowego pojęć „zaniechanie” oraz „bezczytność” nie zasługują na aprobatę. Stanowisko to należy podtrzymać, mimo iż niejednokrotnie w ocenie wierzyciela skutki zaniechania i bezczynności komornika są takie same. Z dużą ostrożnością należy też podejść do postulatów rezygnacji ze skargi na zaniechanie komornika. Efektywność egzekucji wspierają bowiem dokonane w ostatnim czasie zmiany ograniczające zakres dopuszczalności przedmiotowej tej skargi w odniesieniu do aktywnego, nie zaś pasywnego, zachowania komornika.

Słowa kluczowe: czynności komornika, zaniechanie, bezczynność, egzekucja, nadzór judykacyjny, odmowa dokonania czynności

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