IUS ET ADMINISTRATIO **ISSN 2300-4797**

NR 3/2023 (52) **DOI: 10.15584/iuseta.2023.3.4**

dr Paweł Falenta
ORCID: 0000-0002-7484-3604
e-mail: pawel.falenta@wsb.wroclaw.pl
Wydział Finansów i Zarządzania
Wyższa Szkoła Bankowa Merito we Wrocławiu

Limitation of the rights of the accused under the new Article 266 § 1a of the Code of Criminal Procedure

Ograniczenie praw oskarżonego na tle nowego art. 266 § 1a k.p.k.

Abstract

This article deals with the issue of financial guarantee in the aspect of changes to the Code of Criminal Procedure. The author analyzes the introduced change and its impact on the rights of the accused, the possibility of the surety and, in a broader context, on the course of the preparatory proceedings. Particular attention will be paid to the litigation risks, the increase in the prosecutor's powers, the limitation of the possibility of using the surety, as well as possible constitutional violations. The analysis will be carried out with the use of elements of the normative set method.

Keywords: accused, financial guarantee, have a right to defence, penal proceedings, preventive measures.

Streszczenie

Artykuł przedstawia analizę nowego przepisu postępowania karnego z perspektywy praw oskarżonego. Autor dokonał kwerendy uzasadnienia do wprowadzonych zmian, zagrożeń, jakie pojawiają się w związku z praktyką stosowania tego przepisu, jak również naruszenia prawa do obrony i zasady pierwszeństwa stosowania środków nieizolacyjnych. Opracowanie zostało przygotowane z wykorzystaniem elementów metody kompletu normatywnego oraz zakończone syntetycznymi wnioskami.

Słowa kluczowe: oskarżony, poręczenie majątkowe, prawo do obrony, postępowanie karne, środki zapobiegawcze.

1. Introduction

The subject of analysis in this article is the issue of the surety as a preventive measure in criminal proceedings in the context of changes that were introduced on 22 June, 2021. The Act of 20 April 2021, to be more specific Article 3, point 5

of this Act (Journal of Laws of 2021, item 1023) was laid down by a legislator to amend the provision of Article 266 of the Code of Criminal Procedure[1] by adding § 1a which states that "the subject of the surety may not come from a grant to the defendant or another person providing financial guarantee for this purpose. The court or the public prosecutor may make the acceptance of the object of the surety subject to proving the source of the object by the person lodging the surety". Thus, the sources of the property's origin for financial guarantee were limited and the possibility of demanding proof of the source of its origin was introduced. The draft amendments were submitted to the Sejm on 8 January 2021 (auto-amendment 19 January 2021)[2]. On 20 April 2021 the Act was passed by the Sejm, and on 2 June 2021 it was signed by the President. The analysis will be carried out using elements of the normative set method.

In the literature, it is assumed that the content of the surety is a specific agreement resulting from the decision of the procedural authority to apply this measure between this authority and the tenderer of the surety, specifying the conditions for the financial guarantee of the presence and proper participation of the accused in the trial. The implementation of this agreement is guaranteed by the consequence in the form of forfeiture of the objects of the surety and the associated psychological coercion affecting the accused[3]. Given that the surety is a non-custodial preventive measure, the essence of such measures is to restrict certain civil rights and freedoms while letting the accused remain at large[4]. The surety interferes with the right to property set out in Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Paris on 20 March 1952. It is an independent preventive measure, there are no obstacles to it being used together with other non-insulating measures. Although Article 257 § 2 of the Code of Criminal Procedure allows for the provision that the measure will change when the surety is lodged within a specified period, this surety is not a substitute for pre-trial detention[5]. The new regulations significantly limit the use of the institution of the surety, even making it impossible to apply in many cases.

This analysis shows important aspects of the introduction of the new regulation, presents important comments from industry, science and expert circles, raises questions about the risks associated with the application of the new regulation. The analysis was prepared using elements of the normative set method.

[1] Act of 6 June 1997 Code of Criminal Procedure (Journal of Laws of 2021, item 534 as amended).

[2] https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?documentId=3BAB978255C6B3A2C125865700558711 [access: 29.12.2021].

[3] J. Kosonoga, *Komentarz do art. 266 k.p.k., teza I* [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2021, Legalis.

[4] K. Dudka, *Komentarz do art. 266 k.p.k., teza 1* [in:] M. Janicz, C. Kulesza, J. Matras, H. Paluszkiewicz, B. Skowron, K. Dudka, *Kodeks postępowania karnego. Komentarz*, Warszawa 2020, LEX.

[5] *Ibidem*.

2. Justification for the changes

§ 1a was added in the amended provision[6] in Article 266 of the Code of Criminal Procedure, which states that "the object of surety may not come from a grant to the defendant or another person providing the surety made for this purpose. The court or the public prosecutor may make the acceptance of the object of financial guarantee subject to proving the source of the object by the person lodging the surety". In the justification for the amendments to the Act[7], in the form of an auto-amendment, Point 2a introduced the principle of excluding the possibility of covering sureties from grants to the accused or another person providing the surety made for this purpose, in particular from donations, as well as voluntary contributions of individual persons outside the collections results from the essence of the preventive measure in the form of surety. It was noted that this measure assumes the financial liability of the accused or another person providing the surety for the proper performance by the accused of his procedural obligations, in particular the obligation to appear before the procedural authority. This liability is related to the risk of losing funds deposited as the surety if the accused fails to comply with these obligations. If the surety comes from grants to the accused or another person providing the surety for this purpose, the link between liability and the risk of loss of funds is broken, because the accused or the person lodging the surety does not risk losing their own funds, but the funds they obtained as a result of the transfer from third parties[8]. As emphasized in the cited justification, an additional but equally important argument in favor of excluding the possibility of covering the surety from grants to the defendant or another person providing the surety made for this purpose is the fact that if the accused properly performs his procedural obligations and the surety is released, there is an undue gain of material benefit by the guarantor (the defendant or another person) of assets in the form of funds collected from third parties.

The regulation in question was also subject to a criminal sanction, establishing in the amendment Article 1a amending Article 57 of the Code of Petty Offences, which in its new wording states that[9]: "Who: 1) organizes or conducts a fundraiser for (...) a surety (...) is punishable by arrest or a fine".

3. Comments and expert opinions on the introduced changes

The opinions that were expressed in connection with the introduced changes can generally be divided into those not lodging comments and those being critical.

[6] Article 266, section 1a added by Article 3 Point 5of the Act of 20 April 2021 (Journal of Laws of 2021, item 1023) changing among others the Act as of 22 June 2021.

[7] https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=867 [access: 29.12.2021].

[8] *Ibidem*.

[9] Act of 20 May 1971 Code of Petty Offences (Journal of Laws of 2021, item 2008 as amended).

The only fully positive opinion was the opinion of the National Prosecutor's Office, Opinion of PK of 08 February 2021 (PK I BP 0280.8.2021). The first group of opinions includes: the PUODO opinion of 20 January 2021 (DOL.401.12.2021. WL.PM), the PUODO opinion of 03 February 201 (DOL.401.12.2021.WL.PM, the opinion in connection with the auto-amendment to the paper No. 867a), the BAS opinion of 22 January 2021 (BAS-WAPM-120/21 Urgent procedure) and the BRMiŚP opinion of 29 January 2021 (WPL.110.2021.ZS)[10]. An important critical opinion was the opinion of the Supreme Bar Council (opinion of 10 February 2021 (NRA.12-SM.1.2.2021). The Supreme Bar Council emphasized some important facts. *First of all*, it was pointed out that the procedural body, also on the basis of the regulations from before the amendment, could effectively supervise the application of this measure, e.g. at the stage of issuing the decision it could stipulate who the entity paying the surety would be and specify many detailed elements in the decision itself, allowing to watch over the correctness of this measure: the amount, type and conditions of the surety, the deadline for lodging, the amount of damage caused and the nature of the act committed (procedural authorities, however, rarely used this wide catalogue of possibilities). *Secondly*, the Supreme Bar Council stated that the review of the correctness of the application of that measure would take place only at the stage of accepting the subject of the guarantee, which may mean that actions in this area may ultimately prove ineffective. What is more, also in the legal status before the amendment, the authority could carry out a certain control, due to Article 143, paragraph 1, point 9 of the Code of Criminal Procedure – the adoption itself as a separate procedural act). *Thirdly*, it was stated that if there is not a sufficient suspicion that the funds for the surety do not come from a crime, the question of the origin of the subject of the surety remains outside the sphere of interest of the procedural authority – this provision eliminates this idea. The new provision is also a kind of petrification of the financial situation of the suspect or the guarantor. The subject of the surety may not come from the grant to the defendant or another person lodging the surety. It should be added that it refers to any type of contribution (although Article 57 of the Code of Petty Offences refers only to fundraisers, and does not penalize other acts). The prohibition under Article 266, paragraph 1a of the Code of Criminal Procedure means that neither the defendant nor his relatives may, for example, take out loans to cover the surety. *Fourthly*, there has been a reversal of the burden of proof. The legislator provided for the necessity of proving the source of origin of the surety by the guarantor. However, it is impossible to interpret how the suspect or the person submitting the surety would prove this source (a statement of income, a certificate from an employer, a balance sheet, an account statement?). The question arises considering the point where the authority will consider that this demonstration is sufficient and leaves no

[10] https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=867-A [access: 29.12.2021].

doubt. *Fifthly and finally*, as the Supreme Bar Council rightly pointed out, the ban in question raises doubts as to its compliance with the Constitution of the Republic of Poland. This is a broad interference with the constitutional rights and freedoms of individuals – the right to property (Article 64 of the Constitution of the Republic of Poland) and a violation of the principle of proportionality (Article 31, section 3 of the Constitution of the Republic of Poland). Restrictions on the freedom to dispose of one's property at a level that goes far beyond the subject matter of the proceedings raise justified objections and are not justified by law.

Doubts about the new provision were also raised in the commentary by J. Kosonoga[11]. He stated that the changes in preventive measures should be aimed at expanding an effective, non-custodial alternative to pre-trial detention, not at narrowing it down. This was certainly the idea that accompanied the creators of the Code of Criminal Procedure (cf. *Nowe kodeksy karne z uzasadnieniami*, 1997, pp. 419–420). Meanwhile, the adopted solution definitely limits the procedural usefulness of the surety. Indeed, it can only be submitted by a person who already has the appropriate means to do so. Any grant in this respect cannot be regarded as the subject of the guarantee. However, since the essence of the surety is to guarantee the proper conduct of the proceedings in view of the risk of forfeiture, it should not matter how the guarantor came into possession of those funds, except, of course, in the case of their criminal origin. What matters is the amount and type of the surety, which should be assessed in such a way as to take into account the financial situation of the accused and the person lodging the surety, the amount of damage caused and the nature of the act committed (Art. 266 § 2 of the Code of Criminal Procedure). What is more, the procedural authority may determine the conditions for accepting the financial guarantee, as well as verify its acceptance as part of the protocol acceptance (Art. 143 § 1 point 9 of the Code of Criminal Procedure). These are sufficient powers of the procedural authority in the field of shaping the form of the surety adequate to the specific procedural situation. It is important that it guarantees the correct course of criminal proceedings without the need to isolate the accused. Of secondary importance in this context should be whether the guarantor has obtained the funds from the grant or not. He rightly pointed out that the consequence of the restriction introduced is the possibility of obliging the person lodging the surety to prove the source of his origin. This is not a new solution. A similar distribution of the burden of proof occurs in the provisions of criminal law, e.g. as part of the forfeiture of financial benefits derived from crime (Art. 45 § 2 of the Criminal Code). However, one may wonder whether it should characterise the application of non-custodial preventive measures, all the more that unlike a penal measure, the obligation to prove the source of the subject of the surety does not apply to the funds derived from crime. Since the procedural authority

[11] J. Kosonoga, *Komentarz do art. 266 k.p.k., teza III*.

may (optionally) make the acceptance of the subject of the surety 'dependent on' proving the source of its origin, a failure to comply with this obligation means the need to issue a decision refusing to accept the surety. It is a precautionary measure order which is open to challenge under the general rules[12].

K. Eichstaedt, in his commentary edited by D. Święcki[13], noted that the solution adopted by the legislator was critically referred to in the literature, pointing out, among others, that in the Polish reality it is difficult to expect that the person paying the surety has direct access to often a high amount of money that is the subject of the financial guarantee. It is pointed out that, since the funds for the surety cannot come from a grant, the surety must be paid from the funds which are at the disposal of the guarantor. However, it was rightly noted that these funds often come from the sale of movable property, from a loan granted or they constitute financial support for family members. (P. Karlik, *Zmiana w funkcjonowaniu poręczenia majątkowego*, "Rzeczpospolita" of 23 June 2021, Special Supplement No. 97 Courts and Prosecutor's Offices, p. 3). As a result, the adopted solution will mean that the use of the surety may be quite limited, especially if the defendant and his immediate family will not be able to pay the often high amount of the surety from their own resources. It has rightly been noted that the introduction of this solution into the Polish criminal procedure may significantly contribute to an increase in the number of people in custody in connection with the use of an isolation preventive measure (R. Rynkun-Werner, *Poręczenie majątkowe po nowemu – czyli Quo Vadis, ustawodawco? Kilka uwag na tle projektu nowelizacji Kodeksu postępowania karnego of January 2021*, "Palestra" 2021, No. 5, pp. 24–25)[14].

R. Rynkun-Werner in Palestra[15] stressed that it is difficult not to get the impression that the submitted draft amendments, in particular in Article 266 of the Code of Criminal Procedure, have a different purpose than the one indicated in the justification. The above statement is supported not only by the lack of any sense of practical introduction of this change, but also by the mode of proceeding over the project in question. In particular, this should be applied to the institution of public consultations, which, in accordance with Article 34, section 3 of the Standing Orders of the Sejm, should be carried out. According to this regulation, the justification for the draft should present the results of consultations and inform about the presented options and opinions, in particular if the obligation to consult such opinions results from the provisions of the Act. In the case of deputies'

[12] *Ibidem*.

[13] K. Eichstaedt, *Komentarz do art. 266 k.p.k., teza 23* [in:] *Kodeks postępowania karnego*, Vol. I: *Komentarz aktualizowany*, ed. D. Święcki, Warszawa 2021, LEX/el. 2021.

[14] *Ibidem*.

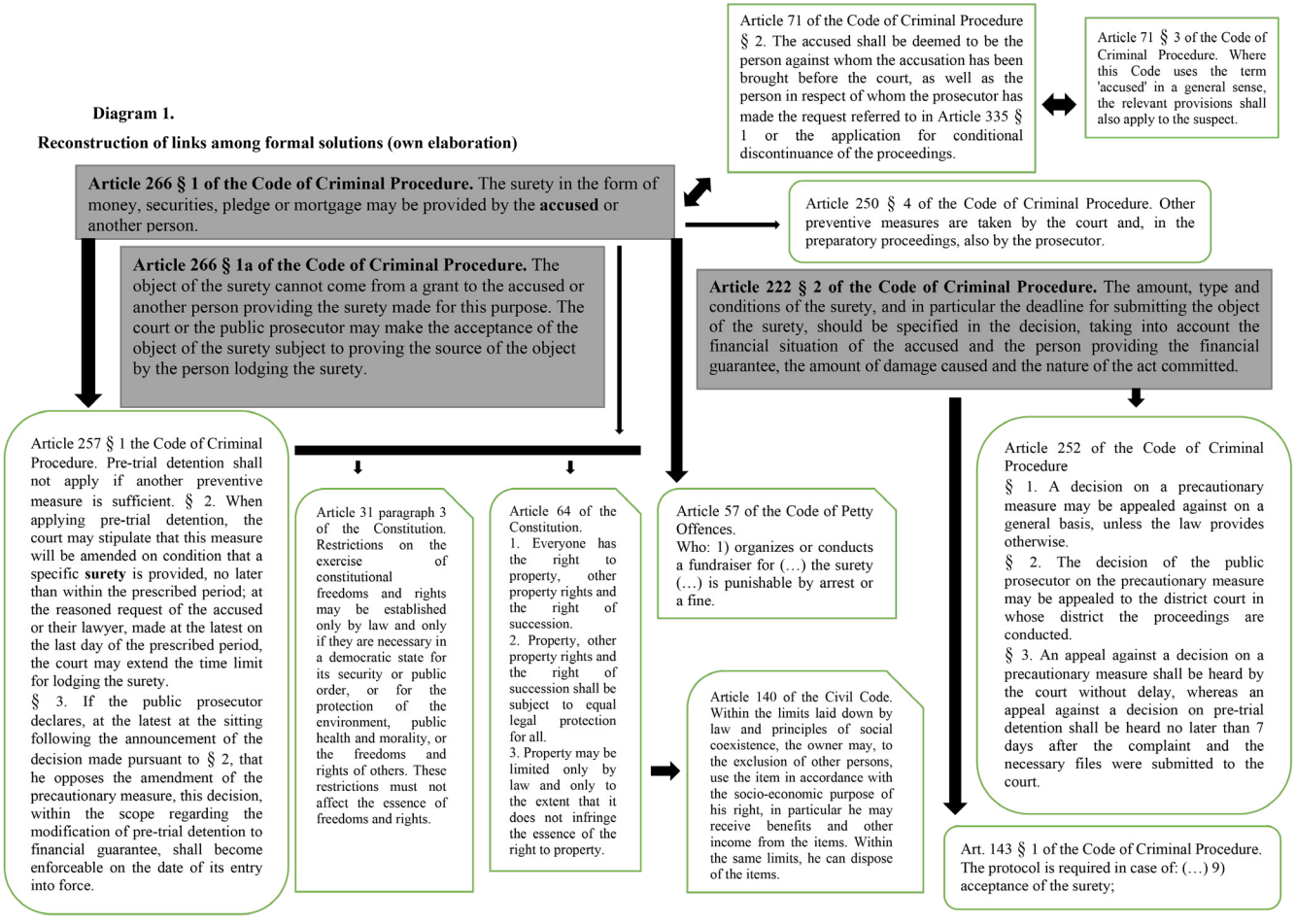
[15] https://palestra.pl/pl/czasopismo/wydanie/5-2021/artykul/poreczenie-majatkowe-po-nowemu-kilka-uwag-na-tle-projektu-nowelizacji-kodeksu-postepowania-karnego-ze-stycznia-2021-r [access: 7.09.2021].

drafts on which no consultations have been held, the Marshal of the Sejm shall submit the draft for consultation before the first reading in the manner and on the terms specified in separate regulations. However, it should be pointed out that in this matter we are dealing with two draft amendments. The original draft, i.e. paper No. 867, does not contain proposals to amend Article 57 of the Code of Petty Offences and Article 266 of the Code of Criminal Procedure. However, the changes in question are contained in the auto-amendment, i.e. paper No. 867A. And here a rather surprising situation occurs. In most of the opinions attached to the discussed drafts, there is no reference at all to the draft amendments resulting from the auto-amendment – paper No. 867A. Interestingly, most of the reviews contain comments, but only for paper No. 867. In addition, the institutions that should first express their position, i.e. the Supreme Court, the National Council of the Judiciary, the Supreme Bar Council or the National Chamber of Legal Advisers, did not comment on the discussed issue at all. According to the author, the proposed changes, radically limiting *the de facto* possibility of using the surety in a criminal trial, appear to be incomprehensible and violate the *ratio legis* of this institution. They do not increase the sense of security or justice in any way. The arguments of the drafters in confrontation with the practice of using this preventive measure do not have a raison d'être. The draft is in direct contradiction with Article 2 of the Constitution, which expresses the principles of a democratic state governed by the rule of law. In its detailed scope, it violates the principle of citizen's trust in the state and the law it makes, the principle of unambiguous law or the prohibition of creating apparent rights. In one of its rulings, the Constitutional Tribunal stated that in a democratic state governed by the rule of law, law-making and the application of the law cannot be a trap for the citizen, and the citizen should be able to arrange his affairs in confidence that he does not expose himself to adverse legal consequences of his decisions and actions that are unpredictable at the time of making these decisions and actions. Such an order also applies to the prohibition of creating apparent rights. A violation of the principle of protection of trust in the state and the law it establishes is a situation in which a specific legal solution is illusory and apparent. The legislator cannot create normative constructions that are unenforceable, constitute an illusion of law and, consequently, give only the appearance of protecting the interests of the individual. The draft in question, in the scope that it makes it practically impossible for the accused or another person who does not have the material resources to provide the surety on his own to carry out and organise a fund-raiser for that purpose, infringes the principle of loyalty of the state to the citizen. If they are adopted, the dubious desirability of the proposed changes will consequently negatively affect the entire system of the criminal action in Poland, which the drafters do not seem to notice[16].

[16] *Ibidem*.

Diagram 1.

Reconstruction of links among formal solutions (own elaboration)



The subject of the amendment to Article 266 of the Code of Criminal Procedure was also noticed and presented in the media. Gazeta Prawna in its publication stated "that it would seem that as a result, only the richest will be able to afford the luxury of being released pending trial, but even in this case it is not so certain. – Even if the accused can afford to pay the amount set by the court, the prosecutor may always disagree, pointing to the need to examine the legality of the origin of money in advance. And until then, the accused will be in custody".

"Completely unnecessary regulations. A sheer 'Republic of Prosecutors'"[17]. In Rzeczpospolita, in turn, judge B. Piwnik stated that the "proposal to amend Article 266 of the Code of Criminal Procedure outrages lawyers. This is another unfortunate proposal. For years, it has been emphasized that the surety should be used as often as possible – and it is even more effective when the suspect or accused person is financially supported by other people. Because it is in their interest not to lose their funds due to irresponsible behavior of the suspect"[18].

5. Category of payoffs (benefits) that these entities can achieve in connection with the actions in question

5.1. For accused and guarantors

Not established.

5.2. For procedural authorities

1) Possibility of influencing the course of the proceedings.

2) Limitation of the possibility of granting sureties.

3) Reversal of the burden of proof in terms of proving the source of the funds for the surety.

4) As a result of the limitation of the possibility of granting sureties, increasing the possibility of applying isolation preventive measures.

6. Category of costs (burdens, ailments) associated with the solutions in question

6.1. For accused and guarantors

1) Limitation of the use of the institution of the surety.

2) Limitation of the rights of the individual, in particular as regards the right to property.

3) The need to prove the source of the funds for the surety and problems with proving it.

4) The possibility of liability under the Code of Petty Offenses.

5) More frequent use of detention as a preventive measure and longer detention stays.

6.2. For procedural authorities

[17] https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8170897,kodeks-karny-nowelizacja-procedury-karnej-co-sie-zmieni.html [access: 7.09.2021].

[18] https://www.rp.pl/prawo-karne/art291921-poreczenie-majatkowe-po-nowemu-wolnosc-tylko-dla-bogatych [access: 7.09.2021].

1) The need to investigate the source of funds for the surety.

2) Limiting the use of simpler non-custodial measures to more complex isolation measures.

7. Reconstruction of links between formal solutions

Diagram 1. Reconstruction of links among formal solutions (own elaboration)

(insert attached diagram here)

8. Conclusion

Based on the presented analysis, the following conclusions and doubts related to the introduced regulation can be formulated:

1. Unclear limitations on the number of granted sureties and an increase in the number of pre-trial detentions.
2. Problems with proving the source of funds for the surety.
3. Violation of constitutional principles: the right to property (Article 64 of the Constitution of the Republic of Poland), the principle of proportionality (Article 31, section 3 of the Constitution of the Republic of Poland), the principle of a democratic state governed by the rule of law (Article 2 of the Constitution of the Republic of Poland).
4. Strengthening prosecutorial powers, freedom of decision.

Bibliography

Dudka K., *Komentarz do art. 266 k.p.k., teza 1* [in:] M. Janicz, C. Kulesza, J. Matras, H. Paluszkiewicz, B. Skowron, K. Dudka, *Kodeks postępowania karnego. Komentarz*, Warszawa 2020, LEX.

Eichstaedt K., *Komentarz do art. 266 k.p.k., teza 23* [in:] *Kodeks postępowania karnego*, Vol. I: *Komentarz aktualizowany*, ed. Święcki, Warszawa 2021, LEX/el. 2021.

Kosonoga J., *Komentarz do art. 266 k.p.k., teza 1* [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2021, Legalis.

Rynkun-Werner R., *Poręczenie majątkowe po nowemu – kilka uwag na tle projektu nowelizacji Kodeksu postępowania karnego ze stycznia 2021 r.*, https://palestra.pl/pl/czasopismo/wydanie/5-2021/artykul/poreczenie-majatkowe-po-nowemu-kilka-uwag-na-tle-projektu-nowelizacji-kodeksu-postepowania-karnego-ze-stycznia-2021-r [access: 21.09.2021].

Legal Acts

Act of 20 May 1971 Code of Petty Offences (Journal of Laws of 2021, item 2008 as amended).

Act of 6 June 1997 Code of Criminal Procedure (Journal of Laws of 2021, item 534 as amended).