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Legal regulation of direct investment in the United Kingdom and EU countries after Brexit

Prawne uregulowanie inwestycji bezpośrednich w Zjednoczonym Królestwie i państwach Unii Europejskiej po brexicie

Abstract

Bilateral free trade agreements and bilateral investment treaties have evolved enormously since the former were signed. The changes consist primarily in covering a broader spectrum of issues which, in addition to the rights and obligations of investors and host countries, define a new axiological basis and further values implemented through the agreements. What has also changed is the legal environment in which the agreements are implemented, including the regulations specifying the competences of the EU member states to sign free trade and investment protection agreements. New multilateral investment agreements have also emerged in global trade. The approach to entrusting investment disputes to arbitration courts has changed. The aim of this study is to anticipate possible scenarios for further regulation of (existing and future) investments made by UK investors in EU countries and vice versa after Brexit.

Key words: bilateral investment treaties (BIT), free trade agreements, Brexit, arbitration court, European Union (EU)

JEL: K20, K33

Streszczenie

Bilateralne umowy o wolnym handlu oraz umowy o wzajemnym wspieraniu inwestycji przeszły od momentu podpisywania pierwszych z nich ogromną ewolucję. Zmiany polegają przede wszystkim na nowej, poszerzonej treści tych umów, określających obok praw i obowiązków inwestorów oraz państw goszczących, nowe podstawy aksjologiczne i dodatkowe wartości realizowane dzięki umowom. Zmieniło się także otoczenie prawne, w jakim obowiązują, w tym przepisy określające kompetencje i zasady podpisywania umów o wolnym handlu i umów o ochronie inwestycji przez kraje członkowskie Unii Europejskiej. Pojawiły się też w globalnym obrocie gospodarczym wielostronne umowy odnoszące się do wspierania i ochrony inwestycji. Zmieniło się podejście do powierzania sporów wynikających z inwestycji trybunałom arbitrażowym. Celem artykułu jest przewidzenie możliwych scenariuszy dalszego uregulowania prawnego inwestycji (obecnych i przyszłych) dokonanych przez inwestorów ze Zjednoczonego Królestwa w krajach UE i odwrotnie, po jego wystąpieniu z Unii Europejskiej.

Słowa kluczowe: umowy o wzajemnym wspieraniu inwestycji (BIT), umowy o wolnym handlu, brexit, trybunał arbitrażowy, Unia Europejska (UE)

Introduction

There are many levels at which countries of the world cooperate and make mutual commitments, including those related to international business. They conclude i.a. agreements that exempt mutual trade from customs duties and fiscal barriers, and agreements providing for mutual support of direct investment and for guarantees to potential investors to protect their projects. After the process of the United Kingdom (hereinafter also: UK) leaving the European Union, which has been going on since 2016, the time has come for the UK to decide (together with the EU)

what legal and economic relations are going to link it with the Member States and the European Union as a whole after the transition period, i.e. at the end of 2020. The UK has the alternative of negotiating individual terms and conditions of cooperation, concluding BIT with the European Union already as a third country; but also of abandoning bilateral agreements with the EU or individual Member States, and confining itself to multilateral agreements by and between the partners.

Characteristics of economic (trade and investment) cooperation agreements

Depending on the material scope of international economic cooperation, several types of agreements between the EU and third countries can be distinguished. With a view to achieving various objectives, the European Union concludes one of the following types of agreements:

Economic Partnership Agreements (EPAs), Association Agreements and Free Trade Agreements (FTAs). Trade agreements are currently concluded on the basis of Article 207 in conjunction with Article 218 TFEU. EU's partners in these agreements include both developing and highly developed countries. They usually enter into talks individually (Canada, Japan, Singapore, Vietnam, etc.), but may also form groups (Mercosur, EFTA, ASEAN countries). The conditions for the UK's withdrawal from the EU do not eliminate the possibility of establishing a reciprocal relationship with the Union based on the rules applicable to free trade agreements. The agreement would then be signed by the EU on the one part and the UK on the other. It is therefore a formula that could potentially form the basis of their future relationship.

It is worth noting that, from the perspective of international public law, trade agreements have different geographical scope. A specific type of them is Regional Trade Agreements (RTAs), aimed at economic integration of neighbouring countries. These include NAFTA, ASEAN, Mercosur, EFTA, but above all the European Union itself. Entrepreneurs, especially smaller ones, prefer to start their foreign expansion from cross-border trade to neighbouring countries, and only then develop other forms of activity (Krzewicki, 2016). Depending on the intent of the parties, FTAs may not only cover free trade issues, but may also be extended to include other forms of economic cooperation, such as protection of direct investment and other issues relevant to the free movement of goods. This group of standards may be covered by a trade agreement or be a separate document. For example, the North American Free Trade Agreement (NAFTA) separates regulations relating to trade and direct investment, dwelling only on the former. ASEAN, within the framework of one agreement, lays the foundations for both: economic (trade and investment) as well as scientific and technical or cultural cooperation. Member States may also forge their external economic relations autonomously, as evidenced i.a. by the agreements concluded by Vietnam or Singapore with the EU.

When referring to free trade agreements, the question is whether the alternative to the UK would be to join EFTA, and via this organisation perhaps even (gradually) the European Economic Area? EFTA provides in particular for the four freedoms of the single market, protection of fair competition and consumer protection, but excludes the existence of a customs union, common commercial or agricultural policy, and disregards common foreign, home affairs or judicial policy. Therefore, if the UK is not able to negotiate individual conditions for withdrawal from the EU, it could be interested in accessing the internal market via EFTA. It is important to note that the UK used to have the status of an EFTA member (1960–1973) and abandoned it in favour of EU accession. Hence it is not very probable that the UK wants to go down the same road again. Nor does joining EFTA seem to be a viable alternative for the UK to build international economic relations, due to the small number of EFTA member states and the fact that they create the EEA at the same time (and, consequently, stay in the so-called Schengen area). Moreover, the EFTA countries are not among the UK's major economic partners.

Potentially, the UK can choose to enter into bilateral free trade or investment treaties only with those countries with which it has genuine economic ties, but this cannot apply to individually designated EU countries as they do not have the competence to enter into such agreements.

As regards the future functioning of trade and investment between the UK and the EU, the UK may therefore, depending on its negotiating policy, set individual exit rules until the end of 2020, either by signing a precedent-setting agreement with the EU, or by opting for the so-called hard (i.e. no-deal) Brexit, and then, depending on its preferences and the intent of the EU, sign a free trade agreement with the EU (within the meaning of Article 207 TFEU) at any time.

The UK is also free to decide not to conclude a free trade agreement with the EU at all. The UK is an independent member of the WTO and will remain one even it loses its membership in the EU. It may therefore hypothetically consider it sufficient to benefit from most-favoured-nation clauses and favourable trade and investment conditions in some 160 countries of the world that are also WTO members. Moreover, it has (as of April 2020) 91 own active BITs[1] . They allow for extensive investment activities in many regions of the world, including several EU countries[2] , which the UK did not give up while still a member of the EU.

Returning to the alternative for the UK to sign a bilateral agreement with the EU after the withdrawal, it shall be noted that agreements concluded by the EU on the basis of Article 218 TFEU concern not only trade issues. They include i.a. issues of intellectual property protection, protection of direct investment, services related to trade in goods. It puts them among the most probable solutions to regulate mutual economic relations with the UK in case of the so-called hard Brexit. Judging from internal problems of the UK in accepting the conditions for departure observed over the last two years, it cannot be ruled out that the UK will withdraw from the EU without an agreement.

In addition to the topic of the types of international economic agreements, it shall be indicated that the conclusion of trade agreements often results in a desire to deepen economic cooperation in the form of a Bilateral Investment Treaty (BIT) or an International Investment Agreement (IIA). In theory, they can also be signed independently of the prior existence of a trade agreement between the parties. For entrepreneurs purchasing direct investments in the host country, Bilateral Investment Treaties provide legal protection, the certainty that their investments will not have to be abandoned or interrupted due to a change in national legislation and, in case of damage, ensure that disputes between the investor and the host country are settled out of national courts by international arbitration courts.

To determine the scope of bilateral arrangements, it is therefore important to define 'foreign direct investments' (FDI). According to the doctrine, FDI are capital flows in which a company from one country creates or expands its subsidiaries in another country. In addition to the transfer of capital, foreign direct investment entails the right to control and manage the entity whose capital has been acquired (Krugman, Obstfeld, 1997, p. 124). Direct investment is therefore considered to be any activity designed to establish a lasting link with an undertaking to which capital is made available for the purpose of pursuing an economic activity. Therefore, FDI includes purchase of shares, long-term loans, establishment or expansion of branches (Ambroziak, 2013, p. 135). The meaning of this concept in EU law is determined in Articles 63–66 TFEU on the free movement of capital and payments.

UK's future economic relations with the Union may also be affected by agreements signed globally. All these solutions include multilateral agreements that are becoming more and more widely used, such as the WTO (and GATS), UNCTAD and the ICSID Convention (Pyka, 2012). Both the UK and the EU are members of this bodies and could find this form of regulation of mutual economic relations sufficient. However, it seems more plausible that they are going to sign a bilateral agreement.

Subject of bilateral investment treaties concluded by the EU

Agreements on the mutual promotion and protection of investments have changed in scope and importance over the years. They were readily signed in the 1960–70s[3] i.a. by the UK with post-colonial countries. Another wave of their popularity dates back to the 1990s as BITs were signed by EU members with post-socialist countries (Słot-Wódkowska, Wiącek, 2018). It should be stressed that one of the assumptions behind the latter was their temporary nature, given the ongoing period of the parties' association with the EU and the prospect of their acquiring full membership in the Union. Currently, EU Member States are parties to around 1,400 (out of a total of 3,200 globally existing) BITs[4]. As a consequence, after 2004 BITs emerged in EU law with Member States as both parties. This has raised doubts as to the scope and legitimacy of their application, even more so in view of the increasing cooperation within the European Union itself. Along with amending the Treaty and deepening the economic union, at least several problems have been identified that could have an impact on the UK's legal and economic relations with the European Union.

With the entry into force of the Lisbon Treaty (1 December 2009) and its inclusion of Article 207 TFEU, the conclusion of agreements on the implementation of common commercial policy has become an exclusive competence of the EU. This Article states that "the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade" (against dumped prices or subsidised sales). Thus, it reinforces the view that commercial policy does not only translate into issues directly related to trade in goods, but at the same time it also creates doubts as to whether agreements containing provisions on free trade and direct investment can be signed together (as a single document) and who has the power to endorse them — the EU alone or together with the Member States. Unfair commercial practices, illegal imitation of products, payment for goods, transport services, establishment and taxation of branches or subsidiaries abroad — this is what freeing of trade entails. So, is direct investment an integral part of commercial policy? (Łukowski, 2018, p. 139).

The broad understanding of commercial policy is also supported by Article 206 TFEU which states that "the Union shall contribute... to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment...". The factual and legal links between free trade and direct investment seem to be undisputed. As a result, FTAs are a combination of many elements and are intended to contribute not only to the development of trade in goods.

The solution to this problem is contained in the opinion of CJEU (Case C-2/15)[5] requested by the European Commission in relation to the BIT with Singapore. It confirmed that the concept of commercial policy also covers the conduct of negotiations in the field of i.a. direct investment, but at the same time it pointed out that other issues in the agreement under negotiation, such as intellectual property protection, consumer protection or the jurisdiction of arbitration courts, go beyond that scope; and that, consequently, the negotiations and signing an agreement covering such a wide range of issues requires Member States to be involved in the negotiation process. Negotiations should therefore be divided into individual segments. The policy aimed at supporting EU entrepreneurs in third countries shall be more effective if it is prepared and negotiated at EU level. In the Commission's view, it would

also be desirable for the standards of investment protection agreements to be defined jointly.

Therefore, the content of signed BITs was gradually becoming more and more extensive and the European Union started (re)negotiating the so-called new generation trade agreements (Łukowski, 2018). The future of agreements previously signed by EU Member States with third countries also had to be decided. The EU's ambition is to gradually replace bilateral agreements signed by Member States with agreements concluded directly by the EU itself. The provisions of Regulation 1219/2012[6], under which all agreements signed or negotiated by EU countries by 9 January 2013 were to be reviewed for compliance with EU law, and progressively replaced by bilateral agreements concluded directly with the Union, will contribute to this.

Bilateral agreements will remain in force until the agreement concluded by the EU with the third country enters into force. Bearing in mind that some Member States (still) have existing reciprocal investment promotion agreements with the UK, it could be assumed that not all of them will be interested in signing another agreement, especially if it is less binding than the 'new generation' ones. The Union will undoubtedly put pressure on its members to replace the bilateral agreements currently in force with an agreement with the EU.

The adoption of a new paradigm for trade and investment agreements has been gradual. Since 2010[7], the Commission has issued several Communications setting out the direction of legislation on agreements with third countries, and has complemented them with regulations aimed at achieving the objectives of the new approach, underlining the importance of commercial and investment policy as part of the Union's core "Europe 2020" strategy. The EU's position presented in these documents confirms that the aim is for international trade to foster innovation and productivity in the economy, contribute to economic growth, stabilise employment and benefit consumers.

It has also been repeatedly pointed out in literature that thanks to direct investment it is possible to create and maintain jobs, optimise the distribution of resources and transfer technology. Direct investment contributes to economic growth and a significant increase in turnover (Ambroziak, 2013, p. 142). Any agreement between the UK and the EU should therefore be drafted in such a way that these benefits continue to be guaranteed. Such an assumption was made in the "political declaration" which is the initial negotiating position between the EU and the UK[8].

This is confirmed by the successive Communications adopted by the Commission, both from the period when the UK had not yet considered leaving the Union and later[9]. The Commission identifies the need to strengthen innovation through the exchange of information and entrepreneurial skills, and systematises the objectives behind the regulation of non-economic issues such as climate and environmental protection, social security of workers, or protection of intellectual property rights or protected designations of origin[10].

On 22 May 2018 the European Council issued conclusions on the negotiation and conclusion of trade and investment agreements as two separate documents. This will strengthen the EU's procedural negotiating mandate for a trade agreement, allowing for parallel negotiations on investment issues, which need to take longer because of Member State participation. Such an agreement has already been discussed with Singapore, Canada and Japan, and could serve as a model for the European Union in its future relations with the United Kingdom. This is also because it is an agreement between partners with similar economic potential and a similar involvement in non-economic global issues.

This is easier to achieve when a partner is a country with a similar level of economic development than in case of developing countries, because of the necessary costs of consumer or environmental guarantees.[11] Establishing these conditions with the UK therefore does not seem to be problematic, although excessive expectations in this respect may cool down the UK's enthusiasm for BIT (Ambroziak, 2013, 146). The fears which resulted in the UK leaving the Union did not relate to single market rules, but rather to monetary policy, the level of contributions to the EU budget, or immigration policy. The EU also has a negative experience of broken talks on TTIP with the US, which should also be taken into account when considering the likelihood of a bilateral agreement.

Resolution of investment disputes

Once the UK withdraws from the EU, judgements by UK courts will no longer automatically be recognised as final by the authorities and courts of other EU countries (and vice versa). Their enforcement will require a prior procedure for recognition of the foreign court's judgement, which significantly extends the recovery of claims. By contrast, final awards of arbitration courts only require an enforcement clause (Świątkowski, 2017). Therefore, it can be assumed that procedural issues and the possibility of using the arbitration clause provided by mutual investment support agreements will contribute to the UK's decision to conclude a bilateral agreement with the European Union (all the more so in case of the possible so-called hard Brexit). The revised negotiating declaration on the UK's withdrawal[12] is very vague about amicable settlement of disputes arising in the context of the agreement to be reached. Therefore, the provisions contained in EU BITs seem to constitute a good model that will best meet the needs of the parties. One of the important provisions of the 'new generation' BITs is one that makes it possible to refer potential investor disputes with the host state to an independent international arbitration court.

At the same time, it should be considered which provisions would apply in the absence of a UK-EU agreement. Recent years have brought legislative changes in the EU relating to BIT arbitration solutions. The discussion on the shape (structure, powers) of arbitration courts to which disputes with the EU are to be submitted is taking place both within the EU and on the global forum, including the WTO (Słot-Wódkowska, Wiącek, 2018).

One of the milestones for arbitration solutions was the CJEU judgement in the Achmea case[13], in which the Court found intra-EU BITs to be contrary to EU law, as violating the principle of autonomy of EU law (Słot-Wódkowska, Wiącek, 2018). The contested provisions included those allowing for using the arbitration clauses between EU members. This has resulted in Member States terminating bilateral agreements with each other, but often with the so-called 'sunset clause' which maintains long-term (10–20 years) protection under the current rules for investments, but only those existing on the date of termination (Kułaga, 2018)[14]. Arbitration solutions in individual BITs to which the UK is a party are therefore temporary. Sooner or later, the UK should decide how it wants to regulate claims arising from active investments and resolve whether the solutions adopted by WTO signatories are sufficient for it, whether it wants to invoke only the ICSID Convention (Menkes, 2017), or whether it chooses to conclude a bilateral agreement with the EU, precisely regulating international arbitration. An important element that may influence the shape of the provisions between the UK and the EU is the (poorly progressing) WTO negotiations (Kułaga, 2018). This has prompted EU countries to transfer the model proposed on the WTO forum, i.e. that of a permanent court of arbitration, to bilateral agreements[15]. Within new generation trade agreements, the EU proposes to create a permanent multilateral investment court (Kułaga, 2018). The new construction has already been used several times (e.g. TTIP, CETA, Singapore (Świątkowski, 2017), so it is a model for mutual arrangements between the UK and the EU. This solution involves the appointment of a 15-member Court, including 5 citizens each from the Union, 5 from the partner country and 5 from third countries, for a term of five years (with the possibility of re-election). Each case would be heard and decided by an individually appointed three-person panel, maintaining the proportion of the groups represented. One of the most important changes is the introduction of the Court of Appeal as an arbitration appeal court (Świątkowski, 2017), in place of the designated national courts. Such a Court would also have the right to ask the CJEU for a preliminary ruling where the subject-matter of the dispute requires an interpretation of EU law.

An essential solution adopted by the EU in the new generation BITs is the elimination of the possibility for an investor to seek compensation at national courts in parallel with the investor's partner doing the same at an arbitration court (Świątkowski, 2017).

As it is not possible to settle the disputes between the UK and the EU within the framework provided by WTO (unless the UK decides to enter into temporary solutions), the lack of protection for new investment appears to be a sufficient incentive to establish terms and conditions of UK's departure on a bilateral basis. One problem in the future would be that the establishment of a dispute settlement system is a shared competence, while the position of Member States should be uniform. It is not certain that the conditions currently established will remain unchanged after the transition period.

Conclusions

Bilateral investment treaties have contributed to the economic growth of the contracting parties for many years. The agreements concluded by the European Union also contain provisions obliging the partners to contribute, through their investments, not only to increased turnover but also to innovation in the economy, high employment standards, social security for workers, as well as sustainable development and climate protection. The EU is therefore willing to conclude them with third countries, but under increasingly strict conditions. In principle, the Union and the UK agree to concede to such additional commitments. However, the relevant agreement is still subject to negotiation, so it is not clear whether and in what form it will be signed, although the EU has established its common negotiating position. The EU, in turn, may disagree with individual terms that derogate in favour of the UK from the rules of 'new generation' agreements. Then, the option of last resort will be to use multilateral agreements with content and objectives similar to BITs as a basis for investment and trade relations.

Przypisy/Notes

[1] In addition, 11 have not entered into force and a further 8 are in the notice period. One of them is the Act of 7 June 2018 on the termination by the Republic of Poland of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Reciprocal Protection of Investments, signed in London on 8 December 1987 (Journal of Laws 2018, 1414) and the Government's declaration of 22 March 2019 on the termination by the Republic of Poland of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Reciprocal Protection of Investments, signed in London on 8 December 1987 (Journal of Laws 2019, 781). As a result, the Agreement expired on 22 November 2019, but remained in force for investments existing on the date of termination until 22 November 2034.

[2] Agreements with Hungary, Malta, Slovakia, the Czech Republic, Romania, Bulgaria, Lithuania, Latvia and Estonia remain in force.

[3] The agreement between Germany and Pakistan concluded in 1959 is recognised as the first BIT. A significant number of agreements also apply to former British colonies signing agreements with the United Kingdom after their independence.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14.10.2015 "Trade for All. Towards a more responsible trade and investment policy" COM(2015)497 final, p. 17.

[5] Opinion 2/15 of the Court of 16 May 2017 (Application of Article 218 TFEU) (OJEU C 376, 2017).

[6] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ L 351, 2012, p. 40).

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 7.07.2010 "Towards a comprehensive European international investment policy" (COM(2010)343 final) and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9.11.2010 "Trade Policy as a core component of the EU's 2020 strategy" (COM(2010)612 final).

[8] Draft text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020, UKTF(2020)14, https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf (30.04.2020).

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 13.09.2017 "A Balanced and Progressive Trade Policy to Harness Globalisation" COM (2017)492 final.

[10] Communication (2015)497 p. 16. It includes i.a. a statement on contributing to the implementation of the commitments under the Paris Climate Agreement.

[11] Communication (2015)497 p. 13.

[12] Declaration of 17 October 2019 https://ec.europa.eu/commission/publications/revised-political-declaration_pl (30.04.2020).

[13] Judgement of the CJEU of 6 March 2018, case C-284/16 Slovak Republic v. Achmea B.V. (OJEU C 158, 2018).

[14] This applies, for example, to bilateral agreements concluded by the UK, including investments made under the bilateral agreement by and between the Republic of Poland and the UK. It maintains the protection of existing investments for 15 years from the expiry of the agreement (i.e. until 22 November 2034). The Government's declaration of 22 March 2019 on the termination by the Republic of Poland of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Reciprocal Protection of Investments, signed in London on 8 December 1987 (Journal of Laws 2019, 781).

[15] In view of vacancies in the WTO Appellate Body, this organisation and 16 of its members (including the EU) have decided to establish an interim review mechanism.

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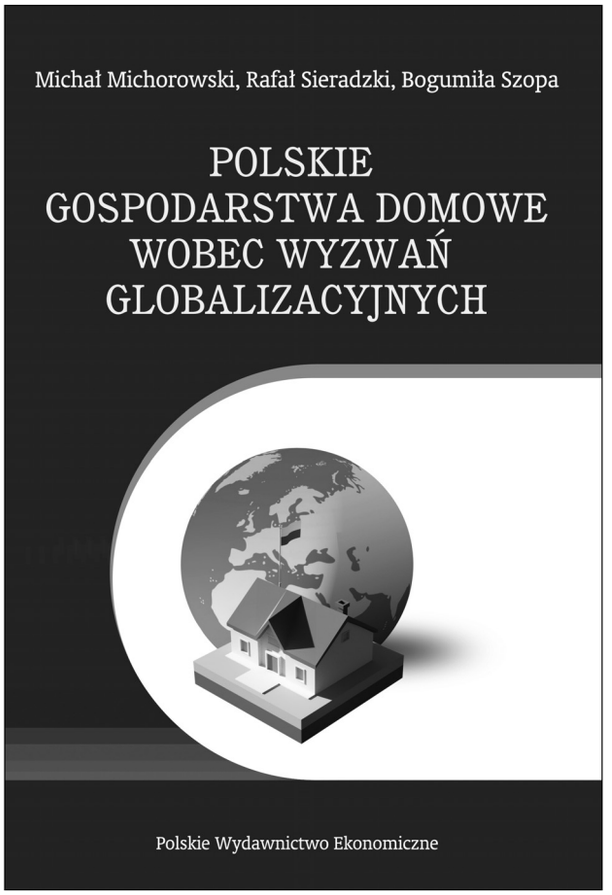

W monografii zdecydowano się na pokazanie wpływu ogólnie korzystnej koniunktury gospodarczej w Polsce w powiązaniu z przekształceniami systemowymi na warunki życia statystycznego gospodarstwa domowego. Wyeksponowano te aspekty sytua-cji gospodarstw, które w istotny sposób wiążą się z aktualnymi, istotnymi wyzwaniami, jakie niesie ze sobą współczesny świat, m.in. globalizację. Głównym kryterium wyboru tematów w książce były kwestie nieporuszane wcześniej, ogólnie dotyczące szczebla mikroekonomicznego, a mianowicie:

- bezpieczeństwo ekonomiczne gospodarstw domowych w kontekście programu „Rodzina 500+”,
- oszczędzanie i aktywa finansowe gospodarstw domowych,
- finansowe turbulencje i upadłość konsumencka,
- korzystanie z energii elektrycznej.

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