

# The Polish migration policy from the perspective of the law regulating the area of the labour market. Unobvious aspects and recent changes

## Polityka migracyjna Polski z perspektywy prawa regulującego obszar rynku pracy. Nieoczywiste aspekty i ostatnie zmiany

### Abstract

Poland does not currently have a document that would regulate the assumptions of the national migration policy in a compact, coherent and comprehensive manner. Such a document should cover various areas of the functioning of the country. A very important part of it, especially in the current economic reality, should be the determination of regulatory directions for the labour market policy regulating the employment of foreigners. This does not mean, however, that Poland has never had a consolidated migration policy or that work on preparing such a document is not carried out. In 2016, the document — *Migration Policy of Poland — current state and postulated actions* [Polityka migracyjna Polski — stan obecny i postulowane działania] of 2012 was annulled. Recently, several documents of such importance have appeared, prepared either as part of public administration activities or grassroots initiatives. Despite the possibility to classify them only as projects or postulates, it should be definitely acknowledged that their content reflects both social and political trends, and therefore constitutes an important point of reference in research on migration-related phenomena. The increase of foreigners' presence on the domestic labour market is an undeniable phenomenon and its further development can be considered certain. For this reason, any legislative actions affecting the access of foreigners to the domestic labour market should be considered a socially important issue. This is because they are a reflection of the legislators' will to regulate access of foreigners to the labour market. The subject of the study will be the examination of the existing legal regulations on access of foreigners to the Polish labour market in order to determine whether, and if so to what extent, they constitute a normatively coherent picture of the residual migration policy. Confronting the established legal state

### Streszczenie

Polska nie ma obecnie dokumentu, który w sposób zwały, spójny i kompleksowy regulowałby założenia krajowej polityki migracyjnej. Dokument taki powinien obejmować różne obszary funkcjonowania państwa. Istotną jego częścią, zwłaszcza w obecnych realiach gospodarczych, powinno być określenie kierunków regulacji prawnych dla polityki rynku pracy w zakresie zatrudniania cudzoziemców. Nie oznacza to jednak, że Polska nigdy nie posiadała skonsolidowanej polityki migracyjnej ani że prace nad przygotowaniem takiego dokumentu nie są prowadzone. W 2016 roku dokument *Polityka migracyjna Polski — stan obecny i postulowane działania* z 2012 r. został unieważniony. W ostatnim czasie pojawiło się kilka dokumentów o takim poziomie oddziaływania, przygotowanych czy to w ramach działań administracji publicznej, czy też inicjatyw oddolnych. Pomimo możliwości zaklasyfikowania ich jedynie jako projektów lub postulatów, należy zdecydowanie przyznać, że ich treść odzwierciedla zarówno trendy społeczne, jak i polityczne, a tym samym stanowi ważny punkt odniesienia w badaniach nad problemami związanymi z migracjami. Wzrost obecności cudzoziemców na krajowym rynku pracy jest zjawiskiem niezaprzeczalnym, a jego dalszy rozwój jest pewny. Z tego powodu wszelkie działania legislacyjne oddziałujące na dostęp cudzoziemców do polskiego rynku pracy powinny być traktowane jako istotne zarówno z ekonomicznego, jak i socjologicznego punktu widzenia. Są one bowiem odzwierciedleniem woli ustawodawcy w zakresie uregulowania dostępu cudzoziemców do rynku pracy. Przedmiotem artykułu jest zbadanie istniejących regulacji prawnych w zakresie dostępu cudzoziemców do polskiego rynku pracy w celu ustalenia, czy, a jeśli tak, to w jakim zakresie, stanowią one spójny normatywnie obraz szczytkowej polityki migracyjnej. Konfrontacja ustalonego stanu prawnego z możliwymi

with possible directions of its development will allow to build *de lege ferenda* postulates in the aspect of migration policy concerning the labour market. Study focuses on those legal aspects of the migration policy concentrated on the labour market that do not seem obvious. Additionally, examples based on changes in the law effective January 29, 2022 will be described.

### Keywords

migration policy, labour market, employment

JEL: J08, J58, J61, O15

## Scope of the analysis

Migration policy, created within the framework of individual legislation (international, supranational, national, local) is always based on specific initial assumptions and objectives to be achieved through its implementation. It is important to recognise this policy not only as a tool for political action. For the purposes of this study the migration policy is being understood as a specific state action, undertaken as part of a broad range of activities classified as "public policy", the essence of which is to strive to create a coherent system of tools aimed at controlling various migration phenomena. It should be borne in mind that the subject matter of this study naturally overlaps with the issues of "labour market policy". This aspect also will be analysed in terms of "policy" rather than "politics".

When defining the scope of this study, it should also be noted that the analysis will not focus on all issues related to the intersection of the migration policy and the labour market. Their multithreading does not allow for a detailed elaboration within an single article. However, it does not escape my attention that apart from the threads discussed in the article, there are also other equally important ones, which require separate analyses. The concentration of attention on selected issues is only due to the need to structure the analyses in a publishing framework.

The thematic scope of the study focuses on economic migration to Poland of foreigners from third countries whose migration objective is the economic aspect. Thus, the article will not analyse the issues related to emigration from Poland and non-legal and legal mechanisms that focus their attention on this phenomenon. The issues related to the return of Polish citizens to Poland, which is gaining popularity, although still on a minor scale (GUS, 2021), are also excluded from the analyses. The analysis will also not cover issues related to migration to Poland by citizens of countries not classified as third countries. Such exclusion of the analyses is dictated by exercising the freedom of movement by the group of non-third country nationals, which, as a rule, makes it impossible to shape regulatory actions, both of non-binding and binding nature, at the national level, which would encroach on the

kierunkami jego rozwoju pozwoli na zbudowanie postulatów *de lege ferenda* w aspekcie polityki migracyjnej dotyczącej rynku pracy. W artykule skupiono się na tych aspektach prawnych polityki migracyjnej skoncentrowanej na rynku pracy, które nie wydają się oczywiste. Dodatkowo opisane zostały przykłady oparte na zmianach w prawie obowiązujących od 29 stycznia 2022 roku.

### Słowa kluczowe

polityka migracyjna, rynek pracy, zatrudnienie

legislative competence of the EU. Therefore, the migration policy relating to third country nationals will be analysed. This group is being classified according to Act of 14 July 2006 on the Entry Into, Residence in and Exit from the Republic of Poland of Nationals of the European Union Member States and Their Family Members (Journal of Laws 2021, item 1697). Article 2 of the abovementioned act enumerates that the group of third country nationals does not include:

- (a) nationals of European Union member states,
- (b) nationals of a Member State of the European Free Trade Association (EFTA) — party to the Agreement on the European Economic Area,
- (c) nationals of the Swiss Confederation,
- (d) citizens of the United Kingdom.

The above groups are classified as EU citizens.

The subject of consideration has been additionally narrowed down to the policy which concerns migrants whose primary and main reason of the migration was the economic purpose. The social importance of the issues related to non-economic migration is, of course, undeniable, as it results in the necessity to include migrants in the labour market after their arrival and settlement. This phenomenon particularly concerns people who migrate because of threats to their health and life. Once settled in a country of arrival, as part of the process of integrating them into society, it is important to take steps to activate them at the labour market.

Analyses on national migration policy, including in relation to the labour market, are present among different research areas.<sup>1</sup> This study focuses on those legal aspects of the migration policy concentrated on the labour market that do not seem obvious and those which derives from the law amendment.

The study does not take into account the legal changes related to the war in Ukraine. They definitely deserve a separate study,<sup>2</sup> which will be possible to prepare once the introduced regulations are set in the legal reality. Only then will it be possible to assess whether the introduced mechanisms are temporary, serving to shape the legal situation of foreigners only in extraordinary circumstances, or whether they are part of a broader context, becoming part of the system related to employment of foreigners.

## Migration policy — a panorama of the systemic context

Migration policy consists of various components, the subject of analysis of which in this article, as already indicated, has been deliberately narrowed. There is no doubt that the size of migration affects the need for foresight on the part of public authorities (Auleyter, 2011, p. 118). The greater the likelihood of a high scale of migratory phenomena, the more it is necessary to safeguard all affected areas. Migration of peoples has always accompanied humanity, however, the degree of its intensity varies. According to statistics published by International Organization for Migration, there were 164 million migrant workers active globally in 2020, which is 2% of the global population. These individuals often move with family members who are not active in labour markets. Labour migration therefore increases the rate of non-labour migration. The IOM estimates that the global total migrant population is 272 million people. 20 years earlier, in 2000, the rate was 150 million (IOM 2020).

Migration policies can emerge at different levels. An example of a supranational migration policy are actions taken at the EU level, headed by the procedure of the new Pact on Migration and Asylum, which is aimed to cover all of the different elements needed for a comprehensive European approach to migration. They may also be prepared at the national level. Focusing on the threads related to national migration policy, it is important to keep in mind that within the framework of building such a policy at the terms related to employment, it is necessary to decide, in the first place, to what extent foreigners should be admitted to the domestic labour market, by defining the limits of application of the principle of complementarity (Florczak, 2019). This decision should be relativized depending on the degree of unemployment among native workers, its reasons and, on the other hand, the degree and characteristics of unsatisfied staffing needs of employers. In this matter the protectionist policy aimed at protecting the domestic labour market must be subject to change, due to the ongoing demographic processes (Mitrus, 2019, p. 1397).

The notion of "migration policy" needs to be systematized, as it can be understood in two ways. Firstly, only a document bearing such a title can be classified as a migration policy. Secondly — migration policy may be understood as a set of actions, of which one of the aspects may, but does not have to, be a document of a general nature, setting out the directions for action. According to this view, the migration policy does not have to be a structured set of postulates and assumptions, and its objectives can be derived from the norms scattered in the legal system and the practices of their application. Such a position, however, is burdened with two fundamental logical fallacies. Firstly, the migration policy understood in such a way becomes a direction of action for itself, because it is the commonly binding norms that determine further directions of their application, without reference

to an overarching signpost showing the path of action. There is no doubt the migration policy can be derived from the law in force, as it should be assumed that it is consistent with the intended purpose of the legislator. However, the migration policy should not be understood only as an organizational and normative layer resulting from the applicable law. It should be understood more broadly — as a set of model solutions, but also as anticipated alternative paths for creating the legal environment, taking into account various long-term scenarios and related changes in the law.

Secondly, reading the migration policy only from the content of legal acts puts into question the sense of validity of documents of a formal nature titled as the "migration policy". In my opinion, in an ideal situation "migration policy" consist of a set of state activities aimed at the normalization of population movements, the directions of which result from an established and publicly available action plan, most often published as the "Migration Policy". In this case, migration policy is both a part of the legal system regulating the processes of population movement, tools for achieving the effects intended by law and a set of provisions of a general nature, which sets the directions of activities related to migration.<sup>3</sup> Unfortunately, in Poland such an ideal model does not function, because in the current state the last of the indicated elements is missing, although relevant documents are not unknown to Polish public policy. Until 2016, the then cancelled document *Migration Policy of Poland — current state and postulated actions (Polityka migracyjna Polski — stan obecny i postulowane działania)* (Rada Ministrów, 2012) from 2012 was in force in Poland. On 10 June 2019, the document *Migration policy of Poland (Polityka migracyjna Polski)* (Departament Analiz i Polityki Migracyjnej MSWiA, 2019) was published, but never came into force. The next document constituting the migration policy of Poland was published by the Ministry of Interior and Administration on 15 December 2020, as *Migration Policy of Poland — Diagnosis of the initial state (Polityka migracyjna Polski — diagnoza stanu wyjściowego)* (Zespół do Spraw Migracji, Departament Analiz i Polityki Migracyjnej MSWiA, 2020). Another step that raised hopes for the finalization of works on the national migration policy was the presentation by the Council of Ministers, in July 2021, of a draft resolution on the adoption of the document *Migration Policy of Poland — Directions for Action 2021–2022<sup>4</sup> (Polityka migracyjna Polski — kierunki działań 2021–2022)*. Unfortunately, work on its adoption has not been completed so far.

## Polish labour market migration policy — hard evidence of the existence?

One of the main legal acts constituting the normative part of the Polish migration policy is the Act on Employment Promotion and Labour Market Institutions (Act on Employment Promotion and Labour Market Institutions of 20 April 2004, Journal of Laws 2021, item

1100, as amended, later as: AEPLMI). It contains, among others, regulations on taking up employment abroad with foreign employers and performance of work by foreigners in the Republic of Poland. In its content, the Act on Employment Promotion and Labour Market Institutions refers mainly to one of the areas of "public policy" — labour market policy. Chapter 2 of the aforementioned Act is entitled "Labour Market Policy", which determines its postulative-descriptive content in the context of regulating labour market mechanisms. The Act on Employment Promotion and Labour Market Institutions makes numerous references to "labour market policy" (e.g., art. 8; art. 9; art. 10; art. 19h; art. 21, art. 22, art. 36d). The related to labour market policy lines of action and tools for achieving them described in the Act on Employment Promotion and Labour Market Institutions leave no doubt that its provisions constitute the regulatory core of this area.

The regulation of the migration policy area at the Act on Employment Promotion and Labour Market Institutions is different. As indicated, there is no doubt that this Act is one of the elements of the national migration policy. Interestingly, in one of its provisions (Article 90 sec. 10) it directly refers to the "objectives of the Polish migration policy". In its provisions Article 90 sec. 10 stipulates that the minister in charge of labour, guided by the objectives of the Polish migration policy, shall define, by way of an ordinance two lists. First one (described in Article 90 sec. 10 item 1 AEPLMI) is about to contain the list of the countries, for whose nationals the seasonal work permit is issued irrespective of fulfilling the condition referred to in Article 88o sec.1 item 2 AEPLMI. This condition refers to the obligation of the entity commissioning work to a foreigner to attach to the application for a seasonal work permit the information of a starost. Such information is issued by a starost competent for the main place of work of a foreigner. In the information, a starost determines whether it is impossible to meet the employer's staffing needs based on the registers of unemployed persons and job seekers or informs about a negative result of a recruitment process organized for the employer. The starost prepares the information taking into account the priority of access to the labour market for Polish citizens and certain categories of foreigners referred to in art. 87 sec. 1 item 1–11 AEPLMI. As regards citizens of the states specified in the regulation issued on the basis of art. 90 sec. 10 item 1 AEPLMI, it is possible to enter an application for a seasonal work permit into the register of applications for seasonal work on the basis of art. 88q AEPLMI. This provision provides the basis for registration of the seasonal work permit for a period longer than the basic period for registration of such a permit, i.e. no longer than 9 months in a calendar year. Thus the regulation issued on the basis of art. 90 sec. 10 item 1 of AEPLMI extends strict borders of complementary access of foreigners to the Polish labour market, making it easier for them to perform work under the seasonal work permit.

In the second list (regulated in Article 90 sec. 10 item 2 AEPLMI) minister in charge of labour specifies the countries whose citizens may perform work without a work permit on the basis of a statement on entrusting work to a foreigner entered in the register of statements, currently available to citizens of Armenia, Belarus, Georgia, Moldova, Russia and Ukraine. The possibility to work on the basis of the statement of entrustment to perform work is one of the main manifestations of loosening the rigid limits of the complementarity principle in the Polish labour migration law.

The discussed regulation is a manifestation of basing very important decisions on Polish migration policy objectives. It is worth noting, for example, that due to human capital deficits, employers operating in the Polish labour market demand the extension of the list of countries whose citizens may use the procedure of legalisation of work based on statement on entrusting work to a foreigner (Jackowska 2022; <https://alebank.pl/od-2022-roku-nowe-przepisy-o-zatrudnieniu-cudzoziemcow-ulatwia-czy-utrudnia-wydawanie-zezwoleń-na-pobyt-czasowy-i-prace/?id=393462&catid=18917&cat2id=28090>). The relevant decision in this respect will have an absolute impact on the functioning of the labour market and the directions of the inflow of economic migrants. However, it is unlikely to be taken soon, since it is to be based on so far undefined objectives of the Polish migration policy. If these objectives are to be understood solely from the existing legal regulations, which is the Ordinance of the Minister of Family, Labour and Social Policy of 8 December 2017 on the countries to whose nationals certain provisions concerning the seasonal work permit and provisions concerning the statement on entrusting work to a foreigner apply (Journal of Laws 2017, item 2349), which defines the relevant list of countries whose citizens may use the described procedure for legalisation of work, the question arises: on what grounds should the minister extend this list? An additional question at this point is on what "objectives of Polish migration policy" did the minister base the current regulation issued in 2017?

The discussed provisions of the Article 90 sec. 10 AEPLMI unfortunately do not provide a solid basis for identifying the source of the objectives of Polish migration policy. However, the postulate assuming the rationality of the legislator requires the conclusion that since the normative act refers to the existence of such, they — objectives of Polish migration policy — are possible to capture within the framework of a comprehensive migration policy.

## **New regulation in force from 2022 — another step into the unknown**

On January 29, 2022, the new regulations based on Act of December 17, 2021, Amending the Law on Foreigners and Certain Other Laws (Journal of Laws of 2022, item 91) came into force. Its regulations are very extensive and a detailed analysis of them from the perspective of the

discussed topic is not possible, nevertheless, it is worth noting two aspects of the changes, with a non-obvious impact on the creation of the labour market migration policy.

When making changes to the law, section 11 of Article 77 of the Law on Foreigners (Act of 12 December 2013 on Foreigners, Journal of Laws of 2021, item 2354, as amended), has been added, according to which the minister in charge of foreign affairs may determine, by means of an ordinance, the list of countries in which applications for a national visa for the purpose of employment (referred to in Article 60 sec. 1 item 5 and 6 of the Law on Foreigners) are accepted from citizens of those countries out of turn. When defining these countries, the minister in charge of foreign affairs may also indicate the professions, types of contracts under which a foreigner may be entrusted with work or types of activity of the entity entrusting work to a foreigner according to the classification defined in separate provisions.

If the minister in charge of foreign affairs issues a relevant regulation, this in itself will be part of the labour market migration policy. However, when issuing it, the minister should use the assumptions of labour market migration policy as a starting point for determining the countries whose citizens will benefit from facilitations in legalising their entry and stay. When determining the relevant ordinance in terms of the professions, the types of contracts under which a foreigner may be entrusted with the performance of work or the types of activities of the entity entrusting the performance of work, the minister may be guided by the analysis of the labour market, including job offers from employers. However, there are no relevant guidelines to determine the overarching issue: the list of countries.

The amendment from January 29, 2022, also introduced a novelty to the Act on Employment Promotion and Labour Market Institutions. Pursuant to the added Article 88cb AEPLMI, the minister competent for economy may determine, by way of an ordinance, a list of entrepreneurs conducting activities of strategic importance for the national economy, taking into account the needs of the national economy and the subject of the entrepreneur's activity. According to art. 88ca AEPLMI, a voivod shall consider applications for a work permit taking into account the priority of foreigners who are to perform work for the entrepreneurs specified in such a list. Thus, another authority (the minister competent for economy) has obtained tools to create a part of the migration policy of the labour market. At the same time, it cannot be concluded that the impact on migration policy will be only indirect, due to the fact that the main emphasis in the development of the ordinance is placed on the determination of "entrepreneurs conducting activities of strategic importance for the national economy". In this context, decisions will be made related to the privileging of

specific employers in obtaining foreigners as persons working for them, and such an area of decision-making is certainly one of the contexts of national migration policy. It should be pointed out that the Act on Employment Promotion and Labour Market Institutions does not provide any guidelines what kind of criteria should the minister responsible for economy take into account to determine "entrepreneurs conducting activities of strategic importance for the national economy". From the point of view of legal transparency, the content of the ordinance that may be issued, may raise significant and fully justified questions about the rationale of the criteria that were considered during the decision-making process.

Both of the indicated examples show some undesirable directions in the regulation of migration policy-making mechanisms. These mechanisms have been regulated as systemically unrelated, and the manner of their implementation is left to the complete discretion of the competent minister. This state of affairs may consequently lead to a lack of coordination of actions in the labour market migration policy and internal incoherence of the functioning legal and organizational system solutions. In this regard, an exemplary model of the migration policy-making are the actions taken at the EU level, within the framework of the aforementioned Pact on Migration and Asylum. Within the framework of the undertaken actions, first the areas of intervention were defined, then the intended objectives and actions necessary to undertake them. Regulating the areas designated for this purpose by means of legislation is only the next of the planned steps.

## Concluding remarks

Summing up the above comments, it should be strongly emphasized that Poland has a labour market migration policy, which, however, is far from perfection. What it lacks in particular is an indication of the general directions of actions related to the presence of economic migrants from third countries on the Polish labour market. This state of affairs does not have a positive effect on the processes related to the employment of foreigners, which was even pointed out by the Supreme Audit Office (NIK, 2019).

Secondly, it is worth noting that a number of attempts were made to develop a set of assumptions for the national migration policy, but they did not end as planned. Therefore, it may be worthwhile to follow the process adopted by the EU institutions with regard to the Pact on Immigration and Asylum in future actions undertaken on the national level.

It is also important that consecutive amendments to the existing legal regulations not only do not improve the image of the Polish migration policy in relation to the labour market issues, but they even deepen its internal entropy. This is due to the introduction of mechanisms which are tools for bottom-up, uncoordinated steering of the labour market migration

policy. In the face of contemporary challenges, such actions should be immediately abandoned, as they may negatively influence the legal certainty which is an important factor determining the decision-making process related to the direction of economic migration.

Harmonization of migration law in aspects related to the labour market is a guarantee of its competitiveness<sup>5</sup> and therefore, as a long-term and comprehensive tool (Solga, 2016, p. 59), a stimulus to attract economic migrants.

## Notes/Przypisy

<sup>1</sup> Such as: Duszczyk, 2012; Iglicka, Olszewska, Stachurski, & Żurawska, 2005, pp. 1–49; Kaźmierkiewicz, 2012; Matyja, Siewierska-Chmaj, & Pędziwiatr, 2015.

<sup>2</sup> From the perspective of protective measures these issues were presented by Uścińska, 2022, pp. 3–14.

<sup>3</sup> If a document called "migration policy" is in force, it cannot be concluded that it is a self-creator of solutions related to this area. Migration policy (including in the aspect of employment) should be understood broadly — as a conglomerate of state activities (both political and legislative-administrative) concerning the regulation and control of entry, stay and departure, as well as the conditions of settlement of foreigners in a given country and granting them citizenship, seeking (temporary) employment there or protection for political or humanitarian reasons (refugee issues) and the rules of going abroad, as well as return and reintegration of its own citizens. (Łodziński & Szonert, 2016, p. 10 and literature cited therein).

<sup>4</sup> Official Journal of the Ministry of Interior and Administration 2016, item 66.

<sup>5</sup> This aspect has been highlighted by the European Parliament, which points out that harmonisation, through the harmonisation of conditions, procedures and rights and the resulting greater legal certainty for third-country nationals, employers and local, regional and national administrations, has a positive impact on competition in EU labour markets. Point 3 of the European Parliament resolution of 20 May 2021 on new avenues for legal labour migration (O.J.C., 12 January 2022).

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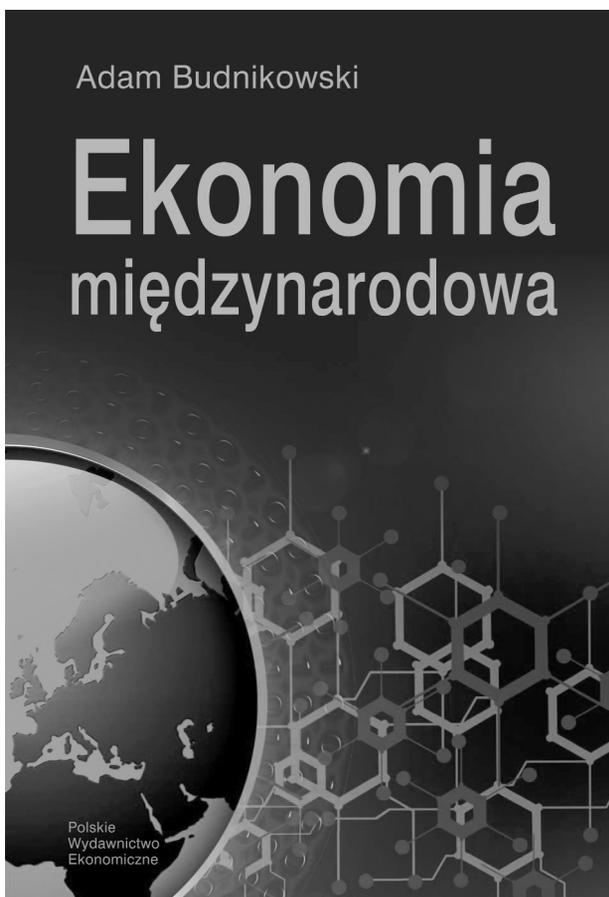
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*Polecamy*

Zakres tematyczny prezentowanego podręcznika obejmuje wszystkie podstawowe zagadnienia wchodzące w skład tradycyjnego kursu tego przedmiotu i nawiązuje do jednego z rozwiązań dominujących w literaturze światowej.

Praca składa się z pięciu części podzielonych na 20 rozdziałów. Część I, wprowadzająca, kończy się próbą zdefiniowania pojęcia i zakresu ekonomii międzynarodowej i, zgodnie z zamierzeniem autora, powinna ułatwić Czytelnikowi przyswojenie dalszych części wykładu. Część II została poświęcona teorii handlu międzynarodowego, część III — polityce handlowej, a część IV — między narodowym stosunkom finansowym. Przedmiotem części V jest miejsce zajmowane w ekonomii międzynarodowej przez wybrane problemy globalne.

Podział na części ma ułatwić Czytelnikowi orientację, a jednocześnie nawiązuje do tradycyjnego podziału ekonomii międzynarodowej na teorię handlu i finanse międzynarodowe. Podział bloków tematycznych na kolejno numerowane rozdziały pozwala na umieszczanie pytań

po mniejszych fragmentach tekstu oraz nadaje całości pracy układ modułowy, umożliwiając także jej fragmentaryczne studiowanie.

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