

**International
Comparative
Legal Guides**



Practical cross-border insights into FDI screening regimes

Foreign Direct Investment Regimes

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

German policy on foreign investments is comparatively liberal. Germany considers its open investment regime as one of the cornerstones of its economic development. In recent years, however, German policy on foreign investments has become more restrictive in certain areas. This policy change was triggered by growing geoeconomic competition and the aim of the EU and Germany to restore technological sovereignty. Despite the resulting changes, interventions against foreign investments by the competent German Federal Ministry for Economic Affairs and Climate Action (Ministry) are still rare.

1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

The German foreign investment review regime is aimed at protecting (i) Germany's essential security interests, (ii) German and European public order and security, and (iii) public order and security with regard to certain projects and programmes of EU interest (see questions 4.2 and 4.3). These terms are general concepts of European law and subject to each Member State's interpretation. However, there is no specific law or guidance in place that explains them in the context of the German Foreign Trade Law. In principle, these concepts aim to protect the national security and functioning of the German state and its institutions. The relevant projects and programmes of EU interest are listed in the annex to the EU Screening Regulation (see question 1.3 below) and either involve substantial EU funding or refer to critical European infrastructure, technologies or security of supply.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

EU Regulation 2019/452 of 19 March 2019 establishing a

framework for the screening of foreign direct investments into the European Union (EU Screening Regulation) entered into force on 11 October 2020 and had a significant impact on the German foreign investment review process, in particular with regard to the scope of the German foreign investment review as well as the cooperation and exchange of information between EU Member States. The EU Screening Regulation and political debates in the ongoing pandemic crisis prompted the latest amendments that came into force in September and December 2021, respectively. We are not aware of any current proposals for a further tightening of the German legal framework (see question 2.1).

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

The legal basis of German control of foreign investments is set out in the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* – AWG) and the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* – AWV). Both pieces of legislation were subject to multiple revisions in order to comply with the specifications of the EU Screening Regulation (see question 1.3). The most notable developments so far are (i) the expansion of the scope of the German foreign investment review, (ii) the lowering of the requirements for possible intervention of the Ministry, and (iii) the establishment of an EU-wide screening mechanism. German control of foreign investments also covers domestic-to-domestic transactions if the acquirer is directly or indirectly controlled by a foreigner (see questions 2.2, 2.4 and 3.2 below).

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?

The German foreign investment control regime distinguishes between (1) the sector-specific investment review (Sections

60–62a AWW), and (2) the general (cross-sector) investment review (Sections 55–59 AWW).

Foreign investments caught under German foreign investment control include share and asset deals. Share deals are only subject to review if the respective threshold is met (see below). Asset deals are only subject to review if a foreign investor acquires (i) a separable part of a German company, or (ii) all essential operating resources of a German company, or a separable part of it, that are necessary to maintain the operation of said company or part of it.

The *sector-specific investment review* is more stringent and applies to any (direct or indirect) acquisition by a foreign investor of at least 10% of the voting rights in or assets of a German company that:

- develops, manufactures, modifies or has actual control over certain listed goods related to weapons, ammunition and armaments or, by doing so in the past, still has knowledge of or other access to the technology underlying such goods;
- develops, manufactures, modifies or has actual control over certain defence-related goods or, by doing so in the past, still has knowledge of or other access to the technology underlying such goods;
- manufactures or has manufactured certain products with IT security functions for the processing of government-classified information or components of such products that are essential for the IT security function and is still in possession of the underlying technology; or
- qualifies as a defence-related entity.

The *general (cross-sector) investment review* covers direct or indirect acquisitions of German companies in all other industries. Unlike the sector-specific investment review, it only applies to foreign investors based outside the EU and the European Free Trade Association (EFTA). The general investment review can further be sub-categorised into: (i) the review of investments into critical infrastructure; (ii) the review of investments into critical industries; and (iii) the review of investments into all other sectors.

The general investment review for *critical infrastructure* applies to the (direct or indirect) acquisition of 10% or more of the voting rights in or the assets of a German company that qualifies as:

- an operator of critical infrastructure, such as essential facilities, installations or parts thereof in energy, IT, telecommunications, transportation, healthcare, water, food, finance and insurance industries;
- a developer or manufacturer of certain critical components or software specifically designed or modified for critical infrastructure;
- an operator of telecommunication systems or manufacturer of technical equipment for telephone surveillance;
- a large cloud computing service provider;
- an authorised provider for services and components of the telematics infrastructure;
- a media company; or
- a service provider of state communication infrastructure.

The general investment review for *critical industries* applies to the (direct or indirect) acquisition of 20% or more of the voting rights in or the assets of a German company that qualifies as:

- a manufacturer, developer or distributor of certain products in the healthcare sector, such as personal protective equipment or related production facilities, essential medicines, medical devices, and *in vitro* diagnostics;
- an operator of high-quality geospatial systems;
- a manufacturer or developer of certain goods applying artificial intelligence that can be used for cyber-attacks, disinformation, surveillance or the analysis of location data;

- a manufacturer or developer of certain automated motor vehicles, unmanned aerial vehicles or components essential for driving control, navigation or related software;
- a manufacturer or developer of robots with specific characteristics;
- a manufacturer, developer or processor in the area of semiconductors and optoelectronics;
- a manufacturer or developer of cybersecurity/IT security products;
- an operator of certain aviation companies or manufacturer or developer of certain goods or technology related to avionics, navigation, spacecraft and propulsion systems;
- a manufacturer, developer, modifier or user of certain goods related to nuclear materials, facilities and equipment;
- a manufacturer or developer of goods and essential components of quantum computing, quantum communication or quantum-based metrology;
- a manufacturer or developer of certain goods used for manufacturing components made of metal or ceramic materials for industrial applications by the use of additive manufacturing processes ('3D printers') or essential components of such goods or powder materials used during the additive manufacturing processes;
- a manufacturer or developer of certain goods specifically designed to operate wireless or wireline data networks;
- a manufacturer of certain smart meter gateways or security modules;
- a company that employs individuals who work in vital facilities in safety-sensitive locations;
- a company that extracts, processes or refines certain raw materials or their ores;
- a manufacturer or developer of certain goods that fall under the protection of certain patents or utility models constituting state secrets; or
- a company that directly or indirectly cultivates an agricultural area of more than 10,000 hectares.

Apart from *critical infrastructure* and *critical industries*, the general investment review applies only to (direct or indirect) acquisitions of 25% or more of the voting rights in or the assets of a German company if the Ministry considers that such acquisition is likely to affect the public order and security of Germany or any other EU Member State or certain projects and programmes of EU interest.

Once a foreign investor has exceeded the relevant shareholding threshold (10%, 20% or 25%), subsequent share acquisitions in the same company fall within the scope of the German investment review only if they reach or exceed certain thresholds (as the case may be 20%, 25%, 40%, 50% or 75%).

All review procedures only apply to acquisitions of existing German companies. In contrast, setting up a new business or facility in Germany is not subject to any of the above-mentioned investment reviews. Intra-group transfers are also covered by the German foreign investment review, if a foreign investor thereby acquires a direct or indirect interest in a German company. However, in the case that the parent company remains the same and the contractual parties are from the same non-EU/EFTA state and only the chain of ownership in the domestic company changes with no new external shareholder joining the structure (directly or indirectly), the reorganisation may be exempted.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

Particularly under scrutiny are activities concerning military goods, critical infrastructures and other critical industries (see question 2.2).

2.4 How are terms such as 'foreign investor' and 'foreign investment' defined in the law?

'Foreign investors' are defined as all persons or companies that are not German. Germans are natural persons resident or habitually resident in Germany, legal persons and partnerships based or headquartered in Germany, branches of foreign legal persons or partnerships if the headquarters of the branch are in Germany and separate accounts are kept for them, and permanent establishments of foreign legal persons or partnerships in Germany if the permanent establishments are administered in Germany. Residents of the Member States of the EU and EFTA are not treated as foreign investors in the context of the general investment review (see question 2.2).

'Foreign investments' covered by German law include share and asset deals (see question 2.2 above). In practice, the Ministry interprets its competence to review indirect acquisitions by foreign investors very broadly. It reviews the acquisition of German companies by investors based outside the European Economic Area (EEA) or EFTA even if the direct acquiring company is a holding company with own substance based in the EEA or EFTA.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU/non-WTO), including state-owned enterprises (SOEs)?

The general investment review only applies to non-EU/EFTA investors (see questions 2.2 and 2.4). Furthermore, there are no specific rules for certain foreign investors or state-owned investors. However, in its substantive assessment of whether (i) Germany's essential security interests, (ii) German or European public order and security, or (iii) the public order and security of certain projects and programmes of EU interest are affected, the Ministry may also take into account the fact that a foreign investor is (directly or indirectly) controlled or financed by a foreign government.

2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

Yes, a local presence is required. The German foreign investment review only applies to (direct or indirect) acquisitions of voting rights in or assets of a German company.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

Yes, the German foreign investment review also applies to any indirect acquisition of local subsidiaries and/or assets. However, intra-group transfers may be exempted under certain circumstances (see question 2.2 above).

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

The investment review applies to all direct or indirect acquisitions of German companies that meet the conditions outlined

in the response to question 2.2. German law does not contain any market share-based thresholds or monetary thresholds such as turnover or transaction value.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

No, the Ministry does not have discretion to review any acquisition of voting rights in a German company that does not reach the applicable thresholds.

However, when calculating the exact share of voting rights, any other participation must be considered through which the investor solely or jointly exercises effective control over the target company, e.g. any relevant participation in other shareholders or any agreement on the joint exercise of voting rights. Voting rights are also deemed to be exercised jointly if the investor and at least one third person holding a relevant participation in the target company are (i) from the same non-EU/EFTA country, and (ii) controlled and/or financed by its government.

3.3 Is there a mandatory notification requirement and is there a specific notification form? Are there any filing fees?

A transaction that is subject to the sector-specific investment review must be notified to the Ministry. A notification to the Ministry is also mandatory in the context of the general investment review for critical infrastructure and critical industries (see question 2.2).

For all other transactions that may be subject to the general investment review, filing is voluntary. Because the Ministry can initiate an investment review *ex officio* for up to five years after signing, non-EU/EFTA investors often choose to undertake such a voluntary filing (known as application for a certificate of non-objection) in order to obtain legal certainty for a planned acquisition of a German company.

The filing (or notification) must be made in writing or electronically by email. The Ministry does not charge any fees.

3.4 Is there a 'standstill' provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?

The signing of a transaction subject to the German foreign investment review is legally valid but will become invalid at the moment of its prohibition by the Ministry.

However, if a transaction falls within the scope of the sector-specific review or general investment review for critical infrastructure or critical industries and must therefore be notified to the Ministry, the completion (closing) of such transaction is invalid under German civil law until it is cleared. In this case, a factual completion, in particular, the exercise of voting rights or access to certain sensitive information of the target company, can result in fines and/or criminal liability. Although stock market transactions, if immediately reported, are exempted from the closing prohibition, the acquirer remains obliged to neither exercise its voting rights (directly or indirectly) or access any sensitive information until clearance.

If a transaction is ultimately prohibited, the Ministry may unwind the transaction and enforce its decision by imposing restrictions. In stock market transactions, the acquirer will be ordered to sell the stocks and bears the risk of stock price fluctuations.

In all other cases of the general investment review, there is no ‘standstill’ provision prohibiting the closing. However, if the parties to the transaction plan to conduct a voluntary filing and a future intervention of the Ministry is likely, clearance usually becomes a closing condition.

3.5 In the case of transactions, who is responsible for obtaining the necessary approval?

The acquirer is responsible for obtaining the necessary approval.

3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance as to whether the authorities would object to the transaction?

The Ministry is generally open to informal and confidential consultations on jurisdictional, formal and/or substantive questions. However, such discussions with the Ministry are not standard practice and are generally carried out only in more complex cases.

3.7 What type of information do parties to a transaction have to provide as part of their filing?

The type and degree of information to be provided by the acquirer depends on the specific review procedure, as well as the stage of the respective investment review. If applying for a non-objection certificate or notifying the Ministry of the implementation (signing) of a transaction, the filing will include at least the following information:

Information on the target company, such as:

- the company details and information on the management;
- a description of the business activities and industry sector;
- a chart showing the company’s shareholder structure, indicating the direct and indirect shareholders’ percentage of voting rights;
- a workforce breakdown;
- the turnover of the last three fiscal years;
- a list of business contacts with public authorities or companies in the defence sector of the last five years;
- information on the company’s secret protection care and its obligation to protect classified information;
- an indication of the specific category into which the target company’s business might fall in respect of the categories listed under the sector-specific and/or general investment review for critical infrastructure; and
- a list of the main suppliers and main customers in respect of the goods listed under the sector-specific investment review for the last five years.

Information on the transaction, such as:

- a description of the acquisition, including details on the purchase price and the specific type of acquisition (share and/or asset deal); and
- information on the direct and indirect purchasers’ share of voting rights in the target company prior to the acquisition as well as the percentage of voting rights to be acquired and other possibilities to exert control over the target company.

Information on the direct and indirect purchaser(s), such as:

- a list of all direct and indirect shareholders of the direct purchaser, including the company details as well as a chart

showing the respective percentage of the shareholders’ voting rights; and

- confirmation of the existence or the absence of any (i) governmental control and/or financing, (ii) involvement in activities that had a negative effect on the public order or security of Germany or any other EU Member State, or (iii) risk of present or past involvement in activities that would constitute a criminal offence or misdemeanour in Germany under certain statutory law.

Information on the seller:

- the company details and, if the seller qualifies as a foreigner, the designation of a person authorised to accept service of process in Germany.

The above-listed information is not exhaustive. The Ministry will request further information and documents for the investment review. All information must be submitted in German.

3.8 Are there any sanctions for not filing (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?

If a transaction falls within the scope of the sector-specific review or general investment review for critical infrastructure or critical industries and must therefore be notified to the Ministry, the completion (closing) of such transaction is deemed invalid under German civil law (unless it qualifies as stock market transaction) and can result in fines and/or criminal liability unless it has been cleared by the Ministry prior to closing (see question 3.4).

For all other transactions, filing is not mandatory. Thus, such transactions can be closed prior to obtaining clearance from the Ministry without triggering any penalties. However, the foreign investment review can be initiated by the Ministry *ex officio* before or after closing. If a transaction is ultimately prohibited, the Ministry may unwind the transaction and may enforce its decision by imposing restrictions and/or fines (see question 4.5).

3.9 Is there a filing deadline and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?

The acquisition must be notified to the Ministry (at the latest) immediately after signing if subject to a specific investment review or a general investment review for critical infrastructure or critical industries. In all other cases, there is no such notification requirement.

Upon the Ministry’s knowledge of the transaction, the Ministry has two months to investigate (first stage of the review process) and decide whether to initiate formal proceedings (second stage of the review process). If the Ministry does not initiate formal proceedings within two months, approval is deemed to have been granted. Formal proceedings are only initiated by the Ministry if it identifies potential concerns with regard to essential security interests or public order and security (see questions 4.2 and 4.3) that require further scrutiny.

The formal review period lasts for four (additional) months, starting with the submission of a complete filing with all relevant documents. This period is suspended for the duration of providing additional information (i) if requested by the Ministry with administrative action, or (ii) while conducting remedy negotiations. These remedy negotiations are conducted between the investor and the Ministry, and also regularly involve the German

Federal Ministry of Defence. In practice, such negotiations and additional information requests from the Ministry can significantly lengthen the review period. In complex cases or sensitive cases involving defence matters, the Ministry may extend the formal review period by another three to four months.

After five years have elapsed since the signing of a transaction, no formal review proceeding may be initiated.

3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?

There is no accelerated procedure for obtaining the Ministry's approval. The Ministry will normally try to handle straightforward cases that evidently raise no concerns quickly without exhausting the statutory review period. However, the exact duration of the review depends on individual factors, such as the current workload of the department, and the level of information provided in the filing.

The approval timetable can sometimes be expedited through informal pre-filing discussions. If the case handler is made familiar with the case before the formal filing is submitted, it may help to accelerate the process. Therefore, in complex cases, it may be useful to start the preparation of the filing early in the transaction process and approach the Ministry on an informal and confidential basis well ahead of the intended filing date.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

Private third parties are not involved in the review process and do not have any formal participation rights. For example, the review process does not provide for a public hearing.

3.12 What publicity is given to the process and how is commercial information, including business secrets, protected from disclosure?

The Ministry neither publishes any filings or decisions, nor maintains a public list of procedures. The investment review procedure itself is also non-public. The Ministry is under a statutory obligation to ensure the confidentiality of the parties' business secrets *vis-à-vis* private third parties.

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

There are no other administrative reviews in Germany specifically aimed at foreign investments. Transactions may be reportable to the Federal Cartel Office (*Bundeskartellamt*) for merger control review. In addition, some sectors have specific provisions applying to mergers and acquisitions.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The Ministry is responsible for conducting the review and regularly consults other federal authorities and/or federal ministries, such as the Federal Ministry of Defence, the Federal Foreign Office, the Federal Ministry of the Interior and Community,

and the Federal Ministry of Finance. The Ministry requires the prior approval of the federal cabinet, consisting of the chancellor and the ministers, for prohibiting a transaction in the context of the general investment review. Since the EU Screening Regulation entered into force, the Ministry also needs to consult with the European Commission and other EU Member States on ongoing investment reviews.

4.2 What is the applicable test and what is the burden of proof and who bears it?

In the context of a sector-specific review, the Ministry may only prohibit transactions in order to ensure essential security interests of the Federal Republic of Germany. In the context of a general investment review, the Ministry may only prohibit transactions to ensure public order or security (i) of the Federal Republic of Germany, (ii) of any other EU Member State, or (iii) with regard to certain projects and programmes of EU interest. In contrast, the Ministry may not prohibit a foreign investment purely for economic matters, industrial policy or similar reasons.

The Ministry bears the burden of proof that the respective test is met. However, the parties to the transaction are obliged to provide the Ministry with comprehensive information to permit an assessment.

4.3 What are the main evaluation criteria and are there any guidelines available? Do the authorities publish decisions of approval or prohibition?

In the context of a sector-specific investment review, the test is met, in particular, if the transaction is 'likely to affect the essential security interests of the Federal Republic of Germany'. In the context of a general investment review, however, the test only requires that the transaction is 'likely to affect the public order or security (i) of the Federal Republic of Germany or (ii) of any other European Member State, or (iii) with regard to certain projects and programmes of European Union interest'. However, the Ministry has not yet published any guidelines outlining the specific criteria for its substantive assessment.

The German foreign investment review is a non-public procedure (see question 3.12). Thus, the Ministry does not publish any decision of approval or prohibition.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Yes, the Ministry may consider the German (and even foreign) activities of the parties' foreign subsidiaries. It may also request information specifically with regard to such activities of the parties' affiliates.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds? Can the authorities impose conditions on approval?

The criteria to be used for the substantive tests (see questions 4.2 and 4.3) are limited by the wording of the law, which is, however, subject to interpretation. This provides the Ministry with wide discretionary powers, particularly in the context of the general investment review. The Ministry must, however, state the reasons for its decisions.

The Ministry may approve a transaction with or without imposing conditions on the approval or prohibit a transaction in full or in part and may issue restraining orders. The Ministry has also far-reaching powers to implement its decisions: it may prohibit or restrict the exercise of voting rights in the target company; and/or appoint a trustee for unwinding a transaction. In addition, a foreign investor acting contrary to a decision by the Ministry risks monetary fines and/or criminal liability.

4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

German law explicitly provides for the possibility of remedies in the form of either a public law contract or an approval subject to conditions. The Ministry is bound by the general legal principle of proportionality: it shall impose the least restrictive measure that still safeguards the public interest. This means that the Ministry may and must consider remedies proposed by the parties and must accept them if they are suitable to remove the Ministry's concerns. Therefore, it is common for the foreign investor and the Ministry to enter into discussions about potential remedies after the Ministry has raised concerns with regard to the transaction. All settlement arrangements are confidential (see question 3.12).

4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? Is the relevant procedure administrative or judicial in character?

The acquirer may challenge the Ministry's prohibition or restraining order in a judicial court proceeding at the Administrative Court of Berlin. However, due to the Ministry's broad discretionary powers when deciding on an investment review,

the case can only be reviewed by the court on limited grounds. In contrast, third parties may not challenge the Ministry's decision since the foreign investment review only serves the public interest, not the interest of any individuals such as competitors.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Over the last few years, the Ministry has continuously increased its review of foreign investments. Where clearance could previously be obtained by the German government within a few weeks, no politics involved, investment review proceedings nowadays may require considerably more time. It is therefore critical for investors to thoroughly prepare the initial filing and thereby ideally avoid the opening of formal proceedings.

In complex cases, investment review proceedings can take up to one year or longer until clearance because of the participation of several ministries, including the Ministry of Defence, and the geo-economical and geopolitical considerations raised and discussed.

In April 2022, for example, the German government vetoed the acquisition of HEYER Medical AG, a traditional German manufacturer of medical devices with a focus on anaesthesia and respiratory equipment, by the Chinese Aeonmed Group. Marking the third formal prohibition, it has been reported that the main concerns of the German government were the potential impairment of the supply security of the German public health sector.

In practice, we have seen several cases where transactions were abandoned by the parties after the Ministry made clear during the investment review that it does not look favourably on the transaction. Therefore, the rare cases of prohibition do not reflect the actual impact of the law on inbound foreign direct investment by non-EU/EFTA investors in Germany.



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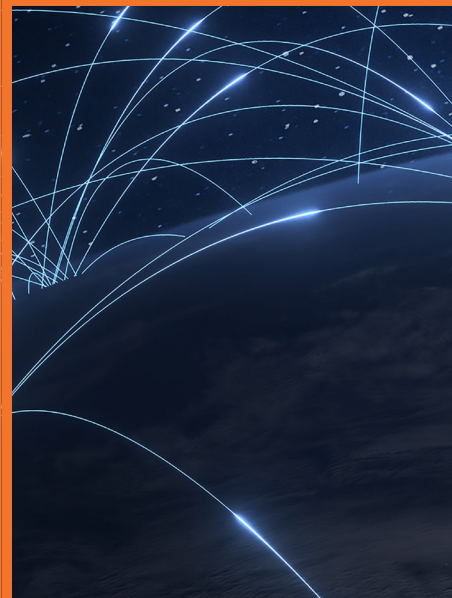
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