

FOREIGN EXCHANGE MANAGEMENT ACT, 1999

CA Pradip Modi

Covering the aspects of ECB (External Commercial Borrowings) /External

Commercial lending ,Trade Credit (TC)

lending in Rupees and FC(Foreign Currency)

FED Master Direction No.5/2015-16

Section 6

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(Omitted by the Finance Act, 2015, w.e.f. 15-10-2019)

"(3) Without prejudice to the generality of the provisions of sub-section (2), **the Reserve Bank may, by regulations, prohibit, restrict or regulate the following—**

- (a) transfer or issue of any foreign security by a person resident in India;
- (b) transfer or issue of any security by a person resident outside India;
- (c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;
- (d) **any borrowing or lending in foreign exchange in whatever form or by whatever name called;**
- (e) **any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;**
- (f) deposits between persons resident in India and persons resident outside India;
- (g) export, import or holding of currency or currency notes;
- (h) transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;
- (i) acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;

(j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred—

(i) by a person resident in India and owed to a person resident outside India; or

(ii) by a person resident outside India."

EXTERNAL COMMERCIAL BORROWINGS FRAMEWORK

2. Introduction: External Commercial Borrowings are commercial loans raised by

eligible resident entities ("Indian Entity" means a company incorporated in India under the Companies Act, 2013, as amended from time to time, or a Limited Liability Partnership formed and registered in India under the Limited Liability Partnership Act, 2008, as amended from time to time) **NO. FEMA 3(R)/2018-RB**

from

recognised non-resident entities

and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters given below apply in totality and not on a standalone basis.

2.1. ECB Framework: The framework for raising loans through ECB (hereinafter referred to as the ECB Framework) comprises the following two options:

Sr. No.	Parameters	FCY denominated ECB	INR denominated ECB
i	Currency of borrowing	Any freely convertible Foreign Currency	Indian Rupee (INR)
ii	Forms of ECB	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; FCCBs; FCEBs and Financial Lease.	Loans including bank loans; floating/ fixed rate notes/bonds/ debentures/ preference shares (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; and Financial Lease. Also, plain vanilla Rupee denominated bonds

			issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.									
iii	Eligible borrowers	All entities eligible to receive FDI. Further, the following entities are also eligible to raise ECB: i. Port Trusts; ii. Units in SEZ; iii. SIDBI; and iv. EXIM Bank of India.	a) All entities eligible to raise FCY ECB; and b) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/cooperatives and Non-Government Organisations.									
iv	Recognised lenders	The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECB. However, a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders; b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.										
v	Minimum Average Maturity Period (MAMP)	MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:										
		<table border="1"> <thead> <tr> <th>Sr.No.</th> <th>Category</th> <th>MAMP</th> </tr> </thead> <tbody> <tr> <td>(a)</td> <td>ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.</td> <td>1 year</td> </tr> <tr> <td>(b)</td> <td>ECB raised from foreign equity holder for working capital purposes, general</td> <td>5 years</td> </tr> </tbody> </table>	Sr.No.	Category	MAMP	(a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year	(b)	ECB raised from foreign equity holder for working capital purposes, general	5 years	
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		<p>corporate purposes or for repayment of Rupee loans</p> <p>(c) ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes</p> <p>(d) ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose</p> <p>(e) ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose</p> <p>for the categories mentioned at (b) to (e) – (i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks (ii) the prescribed MAMP will have to be strictly complied with under all circumstances.</p>	<p>10 years</p> <p>7 years</p> <p>10 years</p>
vi	All-in-cost ceiling per annum	Benchmark rate plus 450 bps spread.	
vii	Other costs	Prepayment charge/ Penal interest, if any, for default or breach of covenants, should not be more than 2 per cent over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.	
viii	End-uses (Negative list)	<p>The negative list, for which the ECB proceeds cannot be utilised, would include the following:</p> <p>a) Real estate activities.</p> <p>b) Investment in capital market.</p> <p>c) Equity investment.</p> <p>d) Working capital purposes, except in case of ECB mentioned at v(b) and v(c) above.</p> <p>e) General corporate purposes, except in case of ECB mentioned at v(b) and v(c) above.</p> <p>f) Repayment of Rupee loans, except in case of ECB mentioned at v(d) and v(e) above.</p> <p>g) On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at v(c), v(d) and v(e) above.</p>	

ix	Exchange rate	Change of currency of FCY ECB into INR ECB can be at the exchange rate prevailing on the date of the agreement for such change between the parties concerned or at an exchange rate, which is less than the rate prevailing on the date of the agreement, if consented to by the ECB lender.	For conversion to Rupee, the exchange rate shall be
	Change of currency of borrowing	Change of currency of ECB from one freely convertible foreign currency to any other freely convertible foreign currency as well as to INR is freely permitted.	Change of currency from INR to any freely convertible foreign currency is not permitted.

- Limit and leverage:** Under the aforesaid framework, all eligible borrowers can raise ECB **up to USD 750 million** or equivalent **per financial year** under the **automatic route**. Further, in case of FCY denominated ECB raised from direct foreign equity holder, ECB liability-equity ratio for ECB raised under the automatic route cannot exceed **7:1**. However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is **up to USD 5 million** or its equivalent. Further, the borrowing entities will also be governed by the guidelines on debt equity ratio, issued, if any, by the sectoral or prudential regulator concerned.
- Loan Registration Number (LRN):** Any draw-down in respect of an ECB should happen **only after obtaining the LRN** from the Reserve Bank. To obtain the LRN, borrowers are required to submit duly certified Form ECB, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category I bank. In turn, the AD Category I bank will forward one copy to the Director, Reserve Bank of India.

- **Monthly Reporting of actual transactions:** The borrowers are required to report actual ECB transactions through [Form ECB 2](#) Return through the AD Category I bank on monthly basis so as to reach DSIM within seven working days from the close of month to which it relates. Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.
- **Creation of Charge on Immovable Assets:** The arrangement shall be subject to the following:
 - a. Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017, as amended from time to time.
 - b. The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/ security trustee.
 - c. In the event of enforcement / invocation of the charge, the immovable asset/ property will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.
- **Creation of Charge over Financial Securities:** The arrangements may be permitted subject to the following:
 - a. Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower is permitted. Pledge on other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/promoter, is also permitted.
 - b. In addition, security interest over all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with ADs in India, standing in the name of the borrower/promoter, can be used as security for ECB. The Rupee accounts of the borrower/promoter can also be in the form of escrow arrangement or debt service reserve account.

- c. In case of invocation of pledge, transfer of financial securities shall be in accordance with the extant FDI/FII policy including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, as amended from time to time.

TRADE CREDITS FRAMEWORK

Sr. No.	Parameters	FCY denominated TC	INR denominated TC
i	Forms of TC	Buyers' Credit and Suppliers' Credit.	
ii	Eligible borrower	Person resident in India acting as an importer.	
iii	Amount under automatic route	Up to USD 150 million or equivalent per import transaction for oil/gas refining & marketing, airline and shipping companies. For others, up to USD 50 million or equivalent per import transaction.	
iv	Recognised lenders	<p>1. For suppliers' credit: Supplier of goods located outside India.</p> <p>2. For buyers' credit: Banks, financial institutions, foreign equity holder(s) located outside India and financial institutions in IFSCs located in India.</p>	
v	Period of TC	The period of TC, reckoned from the date of shipment, shall be up to three years for import of capital goods. For non-capital goods, this period shall be up to one year or the operating cycle whichever is less. For shipyards / shipbuilders, the period of TC for import of non-capital goods can be up to three years.	
vi	All-in-cost ceiling per annum	Benchmark rate plus 250 bps spread.	

vii	Exchange rate	Change of currency of FCY TC into INR TC can be at the exchange rate prevailing on the date of the agreement between the parties concerned for such change or at an exchange rate, which is less than the rate prevailing on the date of agreement, if consented to by the TC lender.	For conversion to Rupee, exchange rate shall be the rate prevailing on the date of settlement.
viii	Hedging provision	The entities raising TC are required to follow the guidelines for hedging, if any, issued by the concerned sectoral or prudential regulator in respect of foreign currency exposure. Such entities shall have a board approved risk management policy.	The overseas investors are eligible to hedge their exposure in Rupee through permitted derivative products with AD Category I banks in India. The investors can also access the domestic market through branches / subsidiaries of Indian banks abroad or branches of foreign banks with Indian presence on a back to back basis.
ix	Change of currency of borrowing	Change of currency of TC from one freely convertible foreign currency to any other freely convertible foreign currency as well as to INR is freely permitted .	Change of currency from INR to any freely convertible foreign currency is not permitted .

- **Non-resident guarantee for domestic fund based and non-fund based facilities:** Guarantee can be invoked by the lender . NR can file suit against Indian borrower for recovery and take away payment outside India ,if paid by him in FC or through inward remittance.

22.10.2020

