

External Commercial Borrowings (ECB)

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Governing Provisions

1. Notification No. FEMA.3R/2018-RB dt. 17th December, 2018.
2. AP (DIR Series) Circular No. 17 dt. 16th January, 2019. – New ECB Framework.
3. AP (DIR Series) Circular No. 23 dt. 13th March, 2019. – New Trade Credit Policy revised Framework.
4. Master Directions No 5/18-19 on ECB dated 26th March 2019 .

ECB Framework -

The framework for raising loans through ECB (herein after referred to as the ECB Framework) comprises the following two options:

Sr. No.	Parameters	FCY denominated ECB	INR denominated ECB
i	Currency borrowing	Any freely convertible Foreign Currency	Indian Rupee (INR)
ii	Forms of ECB	Loans including <ul style="list-style-type: none"> • 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 <ul style="list-style-type: none"> • Same as FCY ECB and • preference shares (other than fully and compulsorily convertible instruments); and • plain vanilla Rupee denominated bonds issued overseas (RDBs), which can be either placed privately or listed on exchanges as per host country regulations.

Eligible Borrowers

All entities eligible to receive FDI. Further, the following entities are also eligible to raise ECB:

- a) Port Trusts;
- b) Units in SEZ;
- c) SIDBI;
- d) EXIM Bank; and
- e) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/cooperatives and Non-Government Organizations (**permitted only to raise INR ECB**).

Whether LLP eligible to receive ECB?

- FDI as defined under FEMA 20(R) : ‘Foreign Direct Investment’ (FDI) is the investment through capital instruments by a person resident outside India (a) in an unlisted Indian company; or (b) in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.
- Foreign Investment Definition under Fema 20(R) : 2.9 ‘Foreign Investment’ is any investment made by a person resident outside India on a repatriable basis in capital instruments of an Indian company or to the capital of an LLP.
- <file:///D:/FEMA/NEW%20ECB%20Policy%20&%20Trade%20Credit/Circular%2017%20of%202019.PDF>

Recognized Lenders

- The lender should be **resident of FATF or IOSCO compliant country**, including on transfer of ECBs. However,
 - a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognized 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 for FCY ECB (except FCCBs and FCEBs).

Resident of FATF or IOSCO Compliant Country:

- **FATF compliant country:** A country that is a member of Financial Action Task Force (FATF) or a member of a FATF-Style Regional Body; and should not be a country identified in the public statement of the FATF as (i) A jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or (ii) A jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.
- **IOSCO compliant country:** A country whose securities market regulator is a signatory to the International Organization of Securities Commission's (IOSCO's) Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with the Securities and Exchange Board of India (SEBI) for information sharing arrangements.

Individuals as Lenders

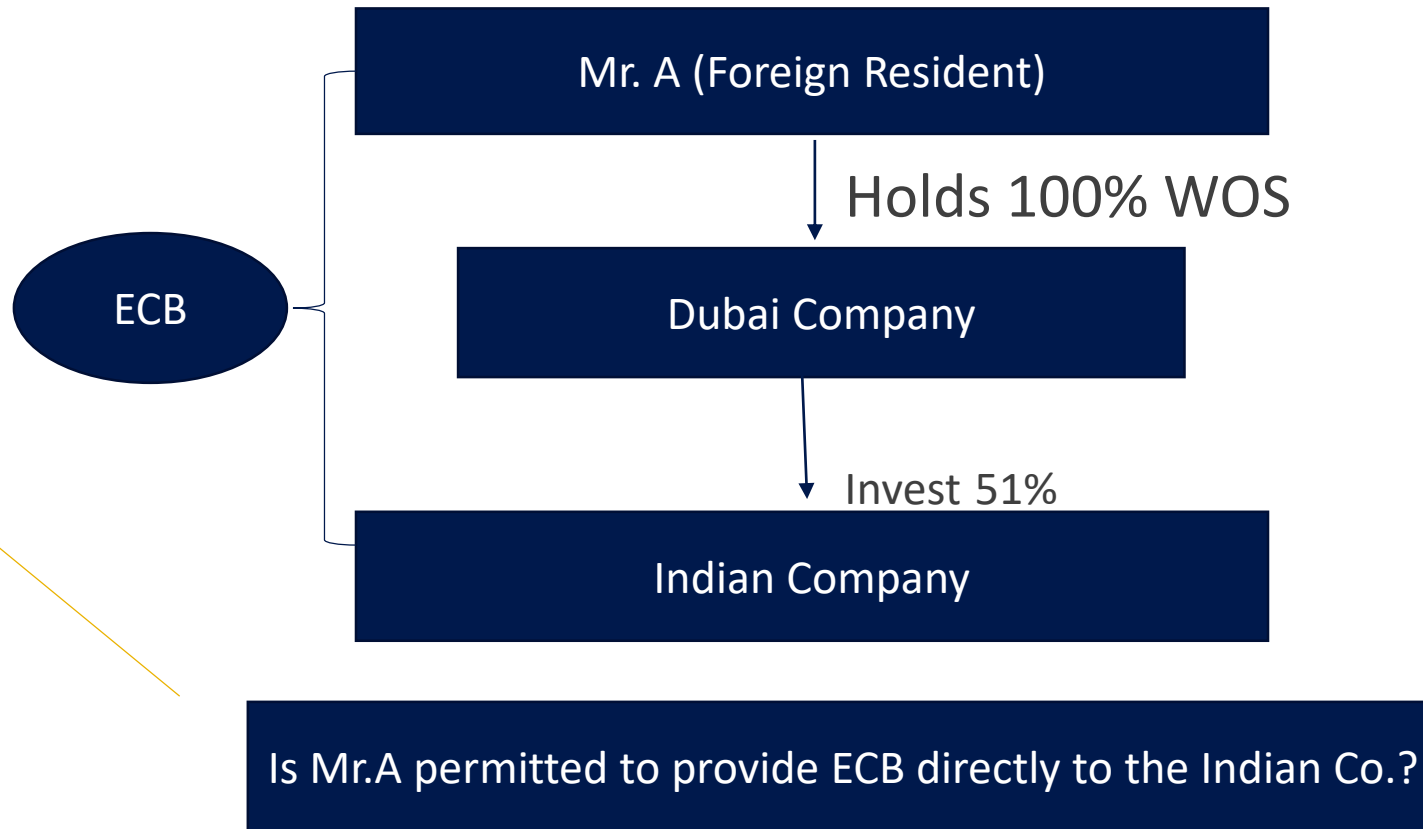
- Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad.

As Defined in ECB Framework:

Foreign Equity Holder: It means

- (a) direct foreign equity holder with minimum 25% direct equity holding by the lender in the borrowing entity,
- (b) indirect equity holder with minimum indirect equity holding of 51%, or
- (c) group company with common overseas parent.

Case Study on Indirect Holding by Individuals:



Minimum Average Maturity Period

- Minimum average maturity period (MAMP) will be 3 years.
- However, **manufacturing sector companies** may raise ECBs with MAMP of 1 year for ECB up to USD 50 million or its equivalent per financial year.
- Further, if the ECB is raised from **foreign equity holder** and utilised for working capital purposes, general corporate purposes or repayment of Rupee loans, MAMP will be 5 years.
- The call and put option, if any, shall not be exercisable prior to completion of minimum average maturity.

End Uses (Negative List)

- The negative list, for which the ECB proceeds **cannot be utilised**, would include the following:
 - a) Real estate activities.
 - b) Investment in capital market.
 - c) Equity investment.
 - d) Working capital purposes **except from foreign equity holder.**
 - e) General corporate purposes **except from foreign equity holder.**
 - f) Repayment of Rupee loans **except from foreign equity holder.**
 - g) On-lending to entities for the above activities.

*RBI vide AP (DIR Series) Circular No. 18 dated 7.2.2019 allowed resolution applicants under the Insolvency Process to raise ECBs for repayment of Rupee term loans of the target company under the approval route

Definitions:

- **1.16. Real estate activities:** Any real estate activity involving own or leased property for buying, selling and renting of commercial and residential properties or land and
 - also includes activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate.
 - However, this would not include construction/development of industrial parks/integrated township/SEZ, purchase/long term leasing of industrial land as part of new project/modernisation or expansion of existing units or any activity under 'infrastructure sector' definition.
- **1.12. Infrastructure Sector:** It has the same meaning as given in the Harmonised Master List of Infrastructure sub-sectors approved by Government of India vide Notification F. No. 13/06/2009-INF as amended / updated from time to time. For the purpose of ECB, "Exploration, Mining and Refinery" sectors will be deemed as in the infrastructure sector.

Extract from Form ECB

- Box II: Borrowing Purpose Code
- Sr.No Code Description
- 1 IC Import of capital goods
- 2 RL Local sourcing of capital goods (Rupee expenditure)
- 3 SL On-lending or sub-lending
- 4 RF Refinancing of earlier ECB
- 5 NP New Project
- 6 ME Modernisation/Expansion of existing units
- 7 OI Overseas investment in JV/ WOS
- 8 MF Micro Finance activity
- 9 OT Others (specify)
- 10 RR Refinancing of rupee loans
- 11 RB Redemption of FCCBs
- 12 IF Infrastructure development
- 13 RC Working capital/ general corporate purpose



Research and
Development
Activity ????

ECB Liability - Equity Ratio

- **Individual Limit of Borrowing** : ECB up to USD 750 mn per F. Y under auto route.
- **FCY ECB from direct foreign equity holder**: Max ratio cannot exceed 7:1.
- However, this ratio will **not be applicable** if o/s ECB is up to USD 5 million or 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.
- **Calculating ECB amount**: includes outstanding amount of all ECBs (other than INR ECB) and the proposed one (only outstanding ECB amounts in case of refinancing)
- **Calculating Equity**: includes the paid-up capital and free reserves (including the share premium received in foreign currency) as per the latest audited balance sheet.
- *Both ECB and equity amounts will be calculated with respect to the **foreign equity holder and its respective** portion of the share premium shall only be considered.*

ECB Framework -

Sr. No.	Parameters	FCY denominated ECB	INR denominated ECB
i	Change of Currency	Allowed	Not Allowed
ii	Exchange Rate	Date of Agreement	Date of Settlement
iii	Hedging	<ul style="list-style-type: none"> Follow guidelines issued, by sectoral or prudential regulator Coverage: principal and interest from the day liability created in books of borrower; Tenor: Minimum tenor of 1 year of financial hedge required with periodic rollover to ensure ECB exposure is not unhedged at any point; Natural: in lieu of financial hedge, to be considered to the extent of offsetting projected cash flows / revenues in matching currency net off projected outflows within same accounting year 	The overseas investors are eligible to hedge their exposure in rupees.

Parking of ECB proceeds

- Parking ECB proceeds
 - a. Abroad
 - ECB for foreign currency expenditure can be parked abroad pending utilization;
 - Can be invested in:
 - Deposits or certificate of deposits offered by banks;
 - Treasury bills and other monetary instruments of 1 year maturity;
 - Deposits with foreign branches / subsidiaries of Indian banks abroad
 - b. Domestically
 - ECB for Rupee expenditure to be immediately repatriated to India;
 - Can be invested in term deposits for maximum period of 12 months

Procedure & Reporting Req

Procedure of raising ECB:

- **Automatic** – should conform to the parameters prescribed.
- **Approval** - application in Form ECB – Annex I to be submitted to AD bank.

Reporting Requirements :

- **Loan Registration Number (LRN):**
- Form ECB along with terms and conditions of ECB to be submitted to obtain LRN;
- Drawdown of ECB only after obtaining LRN from RBI

Procedure & Reporting Req

- **Monthly Reporting of actual transactions:**
- Report actual ECB transactions through Form ECB 2 Return (Annex II) through the AD Category I bank on monthly basis so as to reach DSIM within 7 working days from the close of month to which it relates.
- **Changes in terms and conditions of ECB:**
- To be reported to RBI through revised Form ECB within 7 days of effecting change specifically mentioned in the communication.

- **Late Submission Fee (LSF) for delay in reporting:**
- The delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns, by payment of late submission fees as detailed in the following matrix:

Sr. No.	Type of Return/Form	Period of delay	Applicable LSF
1	Form ECB 2	Up to 30 calendar days from due date of submission	INR 5,000
2	Form ECB 2/Form ECB	Up to three years from due date of submission/date of drawdown	INR 50,000 per year
3	Form ECB 2/Form ECB	Beyond three years from due date of submission/date of drawdown	INR 100,000 per year

- Payment of the LSF would be by way of DD in favour of “Reserve Bank of India” accompanied with the requisite return(s).
- Non-payment of LSF will be treated as contravention of reporting provision and shall be subject to compounding or adjudication as provided in FEMA 1999 or regulations/rules framed thereunder.

Powers of AD Bank

- **Change of AD Bank** : AD bank can be changed subject to NOC from existing AD Bankers
- **Cancellation of LRN**: AD Bank may directly approach DSIM for cancellation of LRN for Ecb contracted subject to ensuring no drawdown against the same.
- **Refinancing of Existing ECB**: Permitted subject to refinancing is beneficial to the Borrower in terms of cost and the overall outstanding amount is not reduced.

Conversion of ECB into Equity

- Conversion of ECBs, including those which are matured but unpaid, into equity is permitted subject to the following conditions:
 - i. borrowing company is under the automatic route for FDI or Government approval is received,
 - ii. Conversion not to breach applicable sectoral cap under FDI policy
 - iii. Applicable pricing guidelines for shares are complied with;
 - iv. Compliance with prudential guidelines issued by RBI in case of other borrowings from Indian banking system
 - v. Consent of other lenders,
 - vi. For conversion of ECB into equity, the exchange rate prevailing on the date of the agreement or any lesser rate can be applied. fair value of the equity shares should be of the date of conversion only.

Conversion of ECB into Equity

- vii. Reporting to the Reserve Bank will be as under:
 - For partial conversion, the converted portion in - Form FC-GPR. And monthly reporting to DSIM in Form ECB 2 Return will be with suitable remarks, viz., "ECB partially converted to equity".
 - For full conversion, the entire portion - in Form FC-GPR, and reporting to DSIM in Form ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of Form ECB 2 Return is not required.
 - For conversion of ECB into equity in phases, reporting through Form FC-GPR and Form ECB 2 Return will also be in phases.

Security for raising ECB:

AD bank to permit creation of aforesaid security subject to following:

- ECB to be in compliance with the extant ECB guidelines;
- Existence of security clause in the Loan Agreement; and
- No objection certificate from the existing lenders in India

ECB can be raised by providing security as under subject to fulfilment of stipulated conditions:

Charge on: immovable assets; movable assets; financial securities; or Issue of corporate and / or personal guarantees

ECB Facility for Startup

AD Category-I banks are permitted to allow Startups to raise ECB under the automatic route as per the following framework:

- **i. Eligibility:** recognized as a Startup by the CG as on date of raising ECB.
- **ii. Maturity:** Minimum average maturity period will be 3 years.
- **iii. Recognised lender:** Resident of a FATF compliant country except foreign branches/subsidiaries of Indian banks and overseas entity in which Indian entity has made ODI will not be considered as recognized lenders under this framework.
- **iv. Forms:** loans or non-convertible, optionally or partially convert preference shares.
- **v. Currency:** any freely convertible currency or INR or a combination thereof.
- **vi. Amount:** limited to USD 3 million or equivalent per financial year

ECB Facility for Startup:

- **All-in-cost:** As mutually agreed
- **viii. End uses:** For any expenditure in connection with the business of the borrower.
- **ix. Conversion into equity:** permitted subject to Regulations
- **Security:** Open at their choice. However, issuance of guarantee, SBLC, LOU, letter of comfort by Indian banks, all India Financial Institutions and NBFCs is not permitted. The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD d.
- **xi. Hedging:** same as INR ECB and FCY ECB
- **xii. Conversion rate:** as on the date of agreement.
- **xiii. Other Provisions:** Other provisions same as ECB framework. However, provisions on leverage ratio and ECB liability: Equity ratio will not be applicable.

- **Borrowing by IBC Companies**

Eligible borrowers, can forward proposals to raise ECBs, through their AD bank

- **All-in-cost ceiling per annum** - Benchmark rate plus 450 bps spread.
- **Guarantee by Banks and Financial institutions** • Guarantee by Indian banks, financial institutions and NBFCs relating to ECBs is not permitted
- **Investment by FPIs in NCDs** - Not governed by ECB framework
- **ECB for untraceable entity**: Entire new process has been laid down.
- **Borrowing by entities under investigation**: allowed subject to they inform AD about the same who in turn informs the respective agency.

Trade Credit Policy

TC Framework -

Sr. No.	Parameters	FCY denominated ECB	INR denominated ECB
i	Forms of TC	Buyer's Credit and Supplier's Credit	
Ii	Eligible borrower	Person resident in India acting as an importer	
iii	Amount	<ul style="list-style-type: none"> • USD 50 million or equivalent per import transaction. • Up to USD 150 million or equivalent per import transaction for oil/gas refining & marketing, airline and shipping companies 	
Iv	Recognized Lenders	<ul style="list-style-type: none"> • For supplier's credit: Supplier of goods located outside India. • For buyer's credit: <ul style="list-style-type: none"> • Banks, financial institutions, • foreign equity holder(s) located outside India and • financial institutions in International Financial Services Centers located in India. <p>Note: Foreign branches/ subsidiaries of Indian banks are permitted as recognized lenders only for FCY TC</p>	

TC Framework -

Sr. No.	Parameters	FCY denominated ECB	INR denominated ECB
i	Period of TC	From the date of shipment 1. Capital goods: 3 years 2. Non-capital goods: • Operating Cycle or Up to 1 year whichever is less • Shipyards/ Shipbuilders: Up to 3 years	
Ii	All in cost ceiling	Benchmark rate plus 250 bps spread	
iii	Exchange Rate	• Date of Agreement	Date of Settlement
Iv	Hedging	Required to follow guidelines issued by sectoral regulator	Eligible to hedge
v	Change of currency	Same as ECB	
vi	Security	<ul style="list-style-type: none"> • Bank guarantee may be given by the AD max to the amount of TC • Corporate / personal guarantee of borrower subject to conditions given 	

Miscellaneous

All in Cost Ceiling

- It includes rate of interest, other fees, expenses, charges, guarantee fees whether paid in foreign currency or INR except Withholding tax payable in INR.

SEZ/ FTWZ/ DTA

- TC can be raised by a unit/ developer in a SEZ including FTWZ.
- An entity of DTA is also allowed to raise TC for purchase of capital/ non-capital goods from SEZ.
- Should be in compliance with applicable provisions of SEZ Act, 2005 as amended.
- **Date:** Date of transfer of ownership of goods will be treated as TC date.
- **Document:** Inter unit receipt generated through NSDL.

Miscellaneous

Reporting Requirements by AD

Monthly Reporting:

- AD Category I banks are required to furnish details of TCs to RBI
- Suppliers' credit beyond 180 days also to be reported and
- Permissions granted by the AD banks for settlement of delayed import dues also to be reported.

Quarterly Reporting:

- AD Category I banks are also required to furnish data on issuance of bank guarantees for TC on XBRL platforms.

Structured Obligations

Non resident guarantee

Non resident guarantee allowed subject to:

- The non-resident guarantee may discharge the liability by:
 - Payment out of rupee balances held in India
 - By remitting the funds to India
 - By debit o his FCNR(B)/ NRE account
- General permission for repatriation to meet the liability under a guarantee is allowed to the extent of the rupee equivalent of the amount paid by the NR guarantor.

THANK YOU!!!!!!

ABOUT THE COMPANY

S N & Co is a multi disciplinary firm of qualified Chartered Accountants offering wide spectrum of professional services. It is based on strong foundation of values viz. Integrity, Excellence, Commitment, Ownership, Team work and Professionalism.

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