External Commercial Borrowings (ECB) and Trade Credits

(Updated as on May 11, 2018)

These FAQs attempt to put in place the common queries that users have on the subject in easy to understand language. However, for conducting a transaction, the Foreign Exchange Management Act, 1999 (FEMA) and the Regulations made or directions issued thereunder may be referred to. The relevant Principal Regulations are the Foreign Exchange Management (Borrowing or lending in foreign exchange) Regulations, 2000 and Foreign Exchange Management (Borrowing and lending in Rupees) Regulations, 2000. The directions issued are consolidated in the Master Direction on External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers.

A. External Commercial Borrowings (ECB) framework

1. Where can one get the details of extant ECB framework?

The interested party may refer to Master Direction No.5 dated January 1, 2016, as amended from time to time, on 'External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers' (https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10204) for guidance on the extant framework on ECB.

2. Are there other documents which the interested party may refer to know more about the extant ECB framework?

The interested party may also refer to A.P. (DIR Series) Circulars at https://www.rbi.org.in/scripts/Fema.aspx pertaining to External Commercial Borrowings.

3. From when did the extant ECB framework become applicable?

The extant ECB framework announced through A.P. (DIR Series) Circular No. 32 dated November 30, 2015 became applicable from the date of publication of relative regulations in the Gazette of India, i.e., December 2, 2015.

4. What if a company had executed ECB agreement prior to December 2, 2015 and availability period is beyond March 31, 2016/ commencement of drawdown is after March 31, 2016?

Entities raising ECB under previous ECB framework can raise the said loans by March 31, 2016 provided the agreement in respect of the loan is already signed by December 1, 2015. Further, eligible entities can drawdown the ECB proceeds beyond the availability period of March 31, 2016 provided such ECBs are contracted on or before December 1, 2015 and such agreements provide availability period of ECB to be beyond March 31, 2016. In other words, all ECB loan agreements entered into prior to the date of the revised ECB framework coming into effect from December 02, 2015 may continue with the disbursement schedules post March 31, 2016, as already provided in the loan agreements without (requiring) further consent from the Reserve Bank or any AD bank.

5. Is the extant ECB framework different from the framework for issuance of Rupee denominated bonds overseas?

Yes, extant ECB framework is different from the framework for issuance of Rupee denominated bonds overseas. To know more about the framework of issuance of Rupee denominated bonds overseas, interested party may refer to aforementioned Master Direction. Both these frameworks (ECB framework and framework for issuance of Rupee denominated bonds overseas) run separately/concurrently.

6. What are the various types of ECB?

ECBs can be raised as:

1. Loans, eg., bank loans, loans from equity holder, etc.

2. Capital market instruments, e.g.,

floating rate notes / fixed rate bonds / securitised instruments

non-convertible, optionally convertible or partially convertible preference shares

FCCB*

FCEB*

3. Buyers' credit / suppliers' credit

4. Financial lease

** A foreign currency convertible bond (FCCB) is a type of corporate bond issued by an Indian company in an overseas market in a currency different from that of the issuer. Investors have the option of redeeming their investment on maturity or converting the bonds into equity any time during the currency of the bond. The repayment of the principal is in the currency in which the money is raised. In case of a foreign currency exchangeable bond (FCEB), investors have the option of converting the bonds into equity of the offered company. The company issuing FCEB shall be part of the promoter group of the offered company and shall hold the equity shares being offered at the time of issuance of FCEB.*

7. Do FCNR (B) loans come under the ECB framework?

No, foreign currency loans given domestically by Authorised Dealer Category I banks out of the proceeds of FCNR (B) deposits do not come under the ECB framework.

8. Does a company, incorporated in India, raising Rupee denominated loan from an NRI / PIO by way of Non-Convertible Debentures (NCDs) through a public offer get covered under the ECB framework?

No, NRI/PIO giving loan in Rupees to resident company by way of Non-Convertible Debentures (NCDs) through a public offer is not covered under the ECB framework. It is covered under Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000 issued vide Notification No. FEMA 4/2000-RB dated May 3, 2000 as amended from time to time (as per the provisions contained in these Regulations, a company incorporated in India is permitted to raise Rupee denominated loan from an NRI / PIO only by way of issuance of NCDs through a public offer and is subject to other provisions contained in these Regulations).

9. What precautions have to be taken before raising loan from overseas?

Interested party may note that borrowings from overseas have to be in compliance with the applicable ECB guidelines / provisions contained in the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 issued vide Notification No. FEMA 3/2000-RB dated May 3, 2000 as amended from time to time, as applicable / applicable provisions contained in the Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000 issued vide Notification No. FEMA 4/2000-RB dated May 3, 2000 as amended from time to time.

10. Whose responsibility is to ensure compliance with ECB guidelines?

The primary responsibility for ensuring that the borrowing is in compliance with the applicable ECB guidelines is that of the borrower concerned. Any contravention of the applicable provisions of ECB guidelines will invite penal action under the FEMA. Same would be the case for devising a structure which bypasses / circumvents ECB guidelines in any manner and / or raising borrowings in any other manner which is not permitted / disguising borrowing under the wrap of other kind of transactions (like raising export advance(s) without actual exports or raising of export advance by circumventing ECB guidelines by creating any structure overseas or otherwise, etc.) and / or contravening provisions of Regulations mentioned in question 9 above.

B. Eligibility for raising ECB

11. Where can one get more details regarding eligibility of an entity to raise ECB?

Interested party may please refer to the aforementioned Master Direction.

12. Is a Limited Liability Partnership (LLP) or Partnership firm or Proprietary concern eligible to raise ECB?

No, entities which are not covered within the provisions contained in Master Direction stated above [like companies doing trading business (whether online or otherwise), companies involve in activities like tourism, beauty parlour / beauty clinics, entertainment business, retail sales, e-commerce companies, etc., on any other activity not covered within these provisions] are not eligible to raise ECB.

13. Whether all companies operating in software sector space eligible to raise ECB?

No, only those companies in software sector space who are into development of software are eligible to raise ECB. Companies who are into designing and engineering consultancy, servicing of third-party software, providing ancillary IT related services, ITeS, etc., are not considered as software development companies for ECB purposes.

14. What does the term infrastructure sector mean for the purpose of ECB?

For the purpose of raising ECB, Infrastructure Sector 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. Further, for the purpose of ECB, Exploration, Mining and Refinery sectors are also deemed as in the infrastructure sector. It is also clarified that addition of any sector or sub-sector in the Harmonized Master List by the Government of India automatically entitles such sector/sub-sector to raise ECB as 'infrastructure'.

15. What are 'companies supporting infrastructure'?

Companies who help in operations or building of infrastructure as defined in Harmonised Master List of Infrastructure sub-sectors issued by Ministry of Finance as mentioned in the question 14 above will be considered companies supporting infrastructure.

16. Whether educational institutes/ universities/ deemed universities are eligible to raise ECB?

If the educational institute/university/ deemed university is registered as a company under the Companies Act 1956/2013, it can raise ECB as a part of infrastructure sub-sector. ECB guidelines as applicable for infrastructure companies would be applicable for such ECBs.

17. Whether the restrictions in respect of the eligibility of borrowing entities also applicable to Startups?

No, any entity which is recognised as a Startup by the Central Government as on date of raising ECB, would be eligible to raise ECB, irrespective of its business activities,.

C. Currency of ECB

18. What are the requirements in respect of currencies of ECB?

ECB can be raised in Indian Rupees (INR) and / or any convertible currency. Any entity raising INR denominated ECB is not permitted to convert the liability arising out of this ECB into foreign currency liability in any manner or assuming foreign currency risk is any manner by either entering into a derivative contract or otherwise.

D. Recognised Lenders/ Investors

19. What do you mean by prudentially regulated financial entities?

By prudentially regulated financial entities, we mean that the overseas entity is bound by prudential norms / regulations issued by the sector regulator(s) of the host country. This can be explained by giving the example of non-banking financial companies (NBFCs) in India. These NBFCs, in order to operate in non-banking financial sector space in India are issued Certificate of Registration by RBI (sector regulator). Further, after registration these companies are subject to supervision by RBI. Similar prudential norms / regulations should be applicable to the overseas financial entity by the respective overseas sector regulator in order for such entity qualifying as a recognised lender under prudentially regulated financial entity category.

20. A foreign equity holder holding minimum 25% direct equity holding in the borrowing entity or minimum indirect equity holding of 51% in the borrowing entity is a recognised lender. Can the foreign equity holder dispose-off the holding once ECB is contracted?

No, all ECB guidelines including those related to minimum equity holding, are to be fulfilled during the whole tenure of the ECB and not only at the time of contracting of ECB.

21. Whether ECB liability: equity ratio of 7:1 is applicable for raising ECB from both direct and indirect equity holders under automatic route?

No, it is only applicable to direct equity holders.

22. Whether the equity in ECB liability to equity ratio includes non-convertible preference capital?

No, however, compulsorily and mandatorily convertible debentures (convertible within a specified time) and compulsorily and mandatorily convertible preference shares (convertible within a specified time) can be included for calculation of the equity in ECB liability to equity ratio.

E. Average Maturity Period/ Amount

23. How is average maturity period calculated?

You may refer to https://rbidocs.rbi.org.in/rdocs/Content/PDFs/12EC160712_A6.pdf for illustration purposes.

24. Can door-to-door maturity be used in lieu of average maturity?

No.

25. For an ECB raised under Track I for general corporate purpose, can repayment of principal of ECB start before the completion of 5 years?

Yes, however, the ECB should have minimum average maturity period of 5 years.

26. Should the proposed ECB be added to all outstanding ECBs for the purpose of ECB liability to equity ratio?

Yes, apart from ECB raised for refinancing where the proposed ECB amount may not be taken into account to avoid double counting.

27. Whether ECB liability includes non-convertible / partially convertible preference shares?

Borrowing from a person resident outside India by way of issue of preference shares on or after April 30, 2007, other than those which are fully and mandatorily convertible into equity within a specified time, as well as borrowing from a person resident outside India by way of issue of debentures on or after June 07, 2007, other than those which are fully and mandatorily convertible into equity within a specified time, would be treated as ECB and has to conform to ECB guidelines. Thus, the borrowing raised through such instruments after aforesaid dates would be considered for calculation of ECB liability.

28. Should the proposed ECB be added to all outstanding ECBs for arriving at the individual limit for raising of ECBs?

The individual limit for raising ECB under the automatic route will take into account all outstanding ECBs including the proposed one. However, refinancing of ECB amount will not be considered for arriving at individual limit per financial year.

F. All-in-cost

29. Can an eligible borrower simultaneously raise ECBs under Track I and Track II?

Yes, as long as the ECBs are in compliance with the ECB guidelines for the respective tracks as per RBI guidelines.

30. Does all-in-cost ceiling apply on a continuous basis or can be calculated even on average basis?

All-in-cost should be within the applicable ceiling at all times, for eg., giving interest breaching the ceiling in first year and much lower in second year so as to comply on an average, is not permitted.

G. End-uses

31. Can ECB be raised under Track II for general corporate purpose (including working capital)? What will be its minimum average maturity period?

Yes, ECB can be raised under Track II for general corporate purpose (including working capital). The minimum average maturity period will be 10 years.

32. Can ECB be raised under Track III for general corporate purpose (including working capital)? What will be its minimum average maturity period?

ECB can be raised under Track III for general corporate purpose (including working capital) only from foreign equity holders. The minimum average maturity period will be 3 years for ECB upto USD 50 million or equivalent and 5 years for ECB beyond USD 50 million or equivalent.

33. Can ECB be used for real estate activities?

No. All activities under real estate are not permitted as eligible end use for raising ECB.

34. Is import of technical know-how which is not part of a capital good an eligible end use for the purpose of ECB?

No.

35. Can proceeds of ECB, raised under previous framework be used for end uses permitted under the revised framework?

No. ECB raised under the previous framework can be used for end uses permitted under the old framework only.

36. Can ECB be availed for repayment of domestic INR loan?

Yes, however, for Tracks I and III, it is only permitted if ECB is raised from foreign equity holder.

37. Can ECB be availed for making equity investment domestically or buying goodwill?

No. Equity investment either directly or indirectly (through purchase of goodwill) is not permitted.

38. Can ECB be availed for making contribution in LLP?

No, it is not permitted under any track.

39. Can an eligible borrower raise fresh ECB under Track II for repayment of existing Rupee denominated ECB?

Refinancing of Rupee denominated ECB with Foreign Currency denominated ECB under Track II is not permitted.

H. Refinancing of ECB

40. Can an ECB raised under the erstwhile USD 10 billion scheme be refinanced under the revised ECB framework?

No, the repayment of ECB raised under USD 10 billion scheme is to be undertaken through forex revenues.

41. Can ECB raised under the earlier ECB framework be refinanced/ partially refinanced through an ECB raised under extant ECB framework?

Yes, provided that company continues to be eligible to raise ECB under the extant ECB framework, all-in-cost is lower of the all-in-cost of existing ECB or as applicable to the respective track under the extant framework and residual maturity is not reduced.

42. Can refinancing/ partial refinancing be undertaken under auto route even for ECBs raised under approval route, subject to compliance with guidelines?

Yes.

43. Can ECB under revised ECB framework be raised with average maturity period of 5 years (under Track I) to refinance ECB raised under previous ECB framework?

Yes, however, the all-in-cost should be lower of the all-in-cost of existing ECB or 6 month LIBOR+450 bps per annum. Further, the entity should be eligible to raise ECB under Track I and residual maturity should not reduce.

44. Is 100 per cent mandatory hedging applicable to infrastructure space entities for ECBs being refinanced, which were raised under the earlier ECB framework?

No. Such ECBs will be exempt from the mandatory hedging clause, however, they are encouraged to undertake hedging for the open currency risk exposure.

45. Does the condition of refinancing of ECBs at lower all-in-cost also apply to Track III ECBs?

Yes, if the original ECB raised under Track III is to be refinanced with another ECB under Track III. However, when refinancing of existing foreign currency denominated ECB (Track I/ II) is done by raising Rupee denominated ECB (Track III), the condition regarding lower all-in-cost of the fresh ECB will not apply.

I. Security/ Guarantee

46. Is corporate guarantee from overseas permitted for ECB?

Yes, but only in cases where the overseas guarantor fulfills the criteria of recognised lender under extant ECB guidelines. Fees payable, if any, for this guarantee will form part of All-in-cost of the ECB.

47. Can overseas bank give guarantee for ECB?

An overseas bank (not overseas branches / subsidiaries of Indian bank) is permitted to give guarantee from overseas for ECB, provided it is recognised as ECB lender as per extant ECB guidelines. It may be noted that guarantee fee will form part of all-in-cost of the ECB.

J. Hedging under ECB Framework

48. What is the meaning of 100 per cent hedging of ECB wherever it is so mandated by the RBI?

Wherever 100 percent hedging has been mandated by the RBI, ECB borrowers shall keep their ECB exposure hedged 100 per cent at all times, which would be verified by the Authorised Dealer Category-I bank concerned and reported to RBI through ECB 2 returns. Besides, the ECB borrower shall also have a board approved risk management policy for the ECBs.

49. What are the operational aspects of hedging of ECB wherever it is mandated by the RBI?

Wherever hedging has been mandated by the RBI, the following should be ensured:

i. Coverage: The ECB borrower will be required to fully cover principal as well as coupon through financial hedges. The financial hedge for all exposures on account of ECB should start from the time of each such exposure (i.e. the day liability is created in the books of the borrower).

ii. Tenor and rollover: A minimum tenor of one year of financial hedge would be required with periodic rollover duly ensuring that the exposure on account of ECB is not unhedged / underhedged at any point during the currency of ECB.

iii. Natural Hedge: Natural hedge, in lieu of financial hedge, will be considered only to the extent of offsetting projected cash flows / revenues in matching currency, net of all other projected outflows. For this purpose, an ECB may be considered naturally hedged if the offsetting exposure has the maturity/cash flow within the same accounting year. Any other arrangements/ structures, where revenues are indexed to foreign currency will not be considered as natural hedge.

50. What are the permitted derivative products for hedging of ECB?

Hedging for ECB purposes means hedging currency risk through products as permitted under Master Direction on Risk Management and Inter-bank dealings. Use of any cost reduction structure for hedging of ECB, which does not fully cover the foreign exchange risk currency risk associated with ECB any time during the currency of the borrowing, is not permitted.

51. What are the other requirements in respect of hedging of ECB?

An entity which is raising foreign currency denominated ECB is also required to follow the guidelines for hedging issued, if any, by the respective sector / prudential regulator in respect of foreign currency exposure.

K. Miscellaneous

52. What precautions have to be taken at the time of filing of Form 83 in respect of an ECB?

Any draw-down in respect of an ECB as well as payment of any fees / charges for raising an ECB should happen only after obtaining the Loan Registration Number (LRN) from RBI by filing duly certified Form 83 to the Director, Balance of Payments Statistics Division, Department of Statistics and Information Management (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai – 400 051 (Contact numbers 022-26572513 and 022-26573612). It should be ensured that all terms and conditions of the ECB are reported correctly in Form 83 and none of the columns are left blank (such columns which are not applicable for the borrowing or against which 'nil' information has to be given, should be suitably covered). Changes in ECB parameters, whether under the automatic route with the approval of Authorised Dealer Category –I banks or under the approval route with prior approval of the RBI, should also be reported to the DSIM through revised Form 83 at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form 83, the changes should be specifically mentioned in the communication. Any failure to comply with reporting guidelines in respect of Form 83 for an ECB may invite penal action under FEMA.

53. How are actual transactions of an ECB reported to RBI?

The borrowers are required to report actual ECB transactions, correctly and fully, through duly certified ECB 2 Return through the Authorised Dealer Category-I bank to DSIM as per the periodicity specified by the RBI. None of the columns in ECB 2 Return should be left blank (such columns which are not applicable for the borrowing or against which 'nil' information has to be given, should be suitably covered). The ECB 2 Return should 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 ECB 2 Return suitably. Any failure to comply with reporting guidelines in respect of ECB 2 Return, including failure to adhere to periodicity of reporting, may invite penal action under FEMA.

54. In light of the revised ECB framework, does the borrower need to file revised Form 83?

No, in case no changes are made in terms and conditions of ECB, there is no need to file revised Form 83.

55. Can fixed deposits created out of ECB proceeds, pending utilization, be renewed after completion of maximum permitted period?

No

56. What are the major requirements for Indian banks to participate in ECB space?

Indian banks are not permitted to raise ECB. They can act as ECB lenders (through their overseas branches / subsidiaries) only under Track I of the ECB framework duly ensuring that the applicable prudential norms are complied with. Overseas branches/subsidiaries of Indian banks are permitted only to refinance ECBs of highly rated (AAA) corporates (or equivalent AAA(SO) rating) as well as Navratna and Maharatna PSUs, provided the outstanding maturity of the original borrowing is not reduced and all-in-cost of fresh ECB is lower than the existing ECB. Partial refinancing is also permitted subject to same conditions. Further, any case involving repayment/refinancing of any foreign currency loan by way of rupee loans from Indian banks, prudential guidelines stipulated in paragraph 4(b) of Circular No. BP.BC.85/21.04.048/2014-15 dated April 06, 2015 issued by the Department of Banking Regulation (DBR) of RBI will be applicable which interalia state that such refinance shall be treated as 'restructuring' (and classified/provided for as per extant prudential norms on income recognition, asset classification and provisioning), if the above is extended to a borrower who is under financial difficulty and involve concessions that the bank would otherwise not consider. It should also be noted that if the ECB borrower concerned has availed credit facilities from the Indian banking system including overseas branches/subsidiaries, any extension of tenure / change in average maturity period of ECB / change in all-in-cost of ECB/ conversion of unpaid ECBs into equity (whether matured or not) shall be subject to applicable prudential guidelines issued by the DBR of RBI, including guidelines on restructuring, as applicable. Further, such conversion of ECB into equity shall also be subject to consent of other lenders, if any, to the same borrower or at least information regarding conversions shall be exchanged with other lenders of the borrower.

57. What are the primary roles of the designated Authorized Dealer Category-I bank?

The designated Authorized Dealer Category-I bank, which is the bank branch designated by the ECB borrower, would be primarily responsible for meeting the reporting requirements including obtaining of LRN, exercising the delegated powers under these guidelines and monitoring of ECB transactions.

L. Trade Credits

58. Does discontinuance of LoU/ LoC mean that Trade Credit has been discontinued as a means of trade finance?

No, Trade Credits, including Buyers' Credit, can be availed as a form of clean credit apart from availing Bank Guarantee for Trade Credits, subject to extant Trade Credit guidelines and compliance with provisions contained in Department of Banking Regulation Master Circular No.DBR No. Dir. BC.11/13.03.00/2015-16 dated July 1, 2015 on "Guarantees and Co-acceptances", as amended from time to time. Letters of Credit/ Bank Guarantee arrangements continue as a form of trade finance, as hitherto.

59. Do LoUs/ LoCs, which have been issued prior to issuance of A.P. (DIR Series) Circular No.20 dated March 13, 2018, but whose tenor is not over need to be cancelled?

No, LoUs/ LoCs issued and accepted prior to the issuance of the said circular may continue till their original validity. However, no roll-over is permitted.