

# Protection of participants' and their client's securities

## 1. The different levels of segregation offered by the IBERCLEAR

IBERCLEAR keeps securities accounts in compliance with the obligations set out in Article 38 of Regulation 909/2014 on Central Securities Depositories. IBERCLEAR registration system permits the following segregation methods:

- a) To segregate on a continuous basis between the securities of a participant from those of any other participant.
- b) To segregate the securities of the participant from those of the participant's clients.
- c) To hold in one or several securities account the securities that belong to different clients of a participant ('omnibus client segregation').
- d) To segregate the securities of any of the participant's clients, if so required by the participant ('individual client segregation').

In the scope of the two-tier registration system foreseen in the Securities Markets Law ("LMV"), IBERCLEAR offers its participants different levels of segregation in the manner prescribed by article 9 of LMV and further developed by article 32 of Royal Decree 878/2015. These provisions are detailed in article 19 of IBERCLEAR's Regulation.

Accordingly, the omnibus client segregation option is available through the opening and maintenance of **general third party accounts**, while individual segregation option is available through the opening and maintaining of **individual third party accounts**.

Finally, the IBERCLEAR Procedures Manual describes the technical and functional details of the registry structure and the different accounts available to participants. In particular, the procedures that might be relevant for these purposes are PR110 Registry Structure and PR120 Central Registry.

## **2. Description of costs associated with each level**

All costs associated with the status of participants are regulated and published in the current Circular on fees. The current fee for participation and account maintenance is described in Rule 2 of this Circular, as follows:

*"1. A fee of €300 per month will be charged for the maintenance of the first two accounts associated with each BIC code. The maintenance fee applicable to each additional account will be €150 per month.*

*A fee of €300 per month will be charged for each BIC code that does not maintain any associated accounts.*

The concept "associated account" includes all types of securities accounts offered by IBERCLEAR, such as, own account, general third party account, individual third party account (direct or indirect) and the sub-type of financial intermediary special account.

## **3. Commercial terms**

From an economic point of view, the conditions under which the different types of accounts are offered are established in the Circular on fees.

From an organisational and functional point of view, there are no limitations to the number of accounts, both own and general third-party, that a participant can keep open at IBERCLEAR. Due to this flexibility, participants can organise their own portfolio and comply with their clients' requests, as well as the keeping of their detailed registries, according to their interests and their business methodology.

As regards the individual accounts of third parties, the account may be held directly or indirectly:

- a) In direct keeping, the individual accounts will be managed by IBERCLEAR, which will register directly the transactions of registration and withdrawal in such accounts. The request to open the account shall be made directly by the holder. This possibility is valid only for a very limited set of institutions (for example, securities accounts of the General State Administration).
- b) In indirect keeping, the registrations and withdrawals in the individualised accounts of those holders, natural or legal persons, will be practiced by IBERCLEAR upon the instruction of the participating entities. The request for opening the account will be made by the participant. This possibility is considered as an optional element for certain investors who agree with their corresponding participant to maintain their holdings recognised in the Central Registry of IBERCLEAR.

It must be noted that participants' clients will bear the costs established by participants under their own fee schedule for maintaining securities accounts either in the central registry – by opening individual third party account- or in the detailed registries of the relevant participant.

#### 4. Main legal implications

In any case, the LMV recognises as legitimate owner to whom is registered in the accounting registries of IBERCLEAR or its participants, in the case of detail registries.

Therefore the option of account segregation according to the parameters described above does not affect the legal nature of the registered securities or position of the holder against the issuer, the participant, IBERCLEAR or third parties.

In this regard, article 13.1 of the LMV states as follows:

*"The person who appears legitimised in the entries in the accounting registry shall be presumed to be the legitimate owner and may as a result require the issuing entity to perform on its behalf the benefits to which it is entitled by the security represented by book entries."*

There are many legal consequences arising from the recognition of the proprietary rights. For example, and not for the sake of completeness, the presumed legitimate owner is granted a strong right to act as such against the issuer, requiring it to provide in its favour any benefits to which the securities gives entitlement. Consequently, the law also establishes:

*"The issuer entity that performs in good faith and without gross negligence the benefit in favour of the legitimate owner, will be released, even if the latter is not the owner of the security".*

For these rights to be effective, prior recognition of the right in the corresponding account of the registration system is necessary, as provided in Art. 13.1 of the LMV:

*"For the transmission and exercise of the rights that correspond to the owner, the previous registration in their favour is needed"*

It is also important to highlight the protection granted in favour of the party acquiring the securities in good faith set forth in Article 11.3 of the LMV:

*"The third party acquiring securities represented by means of book-entries in the account of a person who, according to the entries in the book-entry register, is entitled to transmit them will not be subject to any claims, unless at the time of the acquisition it has acted in bad faith or gross negligence."*

## 5. Applicable insolvency law

### 5.1. Applicable national legislation

Article 8 of Directive 98/26/EC states that: *"In the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system"*. This directive was implemented into Spanish legislation by Law 41/1999 of 12 November on payment and securities settlement systems.

Article 204 of Law 22/2003 of July 9 on Insolvency states:

*Article 204. Rights over securities and payment systems and financial markets.*

*"The effects of insolvency on rights that fall on marketable securities represented by book entries shall be governed by the laws of the State where said securities are registered. This rule includes any legally recognised securities register, including those kept by financial entities subject to legal supervision.*

*Without prejudice to the provisions of article 201, the effects of the insolvency on the rights and obligations of the participants in a payment or clearing system or in a financial market shall be governed exclusively by the law of the State applicable to said system or market."*

Consequently, Spanish law is applicable.

### 5.2. Effects of insolvency

In situations of insolvency of the entity responsible for the book-entry register of IBERCLEAR participants, the LMV recognises the right to transfer the securities.

Article 15.1 of the LMV.

*"1. Declared the insolvency of an entity in charge of keeping the register of securities represented by book entries or a participant in the registration system, owners of securities listed in such records shall enjoy the right of separation with respect to the securities registered in their name, and may exercise it by requesting its transfer to another entity, all without prejudice to the provisions of articles 102.2 and 193.2.e)."*

The aforementioned Article 102.2 of the LMV states:

*"Declared the insolvency of a participating entity in the systems referred to in this article, the CNMV, without prejudice to the powers of Banco de España and the FROB may dispose, immediately and without cost to the investor, the transfer of its accounting records of securities to another entity authorised to carry out this activity. If no entity were in a position to take over the above mentioned records, this activity will be assumed by the central securities depository on a provisional basis, until the owners request the transfer of the*

*registration of their securities. For this purpose, both the competent judge and the liquidator authority will facilitate the access of the entity to which the securities are going to be transferred, to the documentation and accounting and digital records necessary to effect the transfer. The existence of the insolvency proceedings will not prevent the client from receiving the securities purchased in accordance with the rules of the clearing, settlement and registration system or the cash from the exercise of the economic rights or the sale of the securities."*

The different segregation options available to the investors does not alter the nature of their rights in securities nor its ability to transfer them in an insolvency scenario.

However, the segregation option chosen may lead to different treatment in the event that a deficit of securities is generated. In this regard, Article 15.4 LMV states:

*"4. In any case and without prejudice to the provisions of the preceding paragraph, when the securities with the same International Securities Identification Number (ISIN) registered in the general third party accounts as a whole of the insolvent participant are insufficient to completely fulfil the rights of the owners registered in the detailed registries maintained by such participant, the total amount held in the general third party accounts as a whole will be distributed pro rata in accordance to the holdings registered in the detailed registries. Damaged owners will have the right to claim for indemnity from the participant for the value of the part not paid in securities."*

## **6. Special securities accounts used in the optional settlement procedure for financial intermediaries**

The optional settlement procedure set out in article 33 of IBERCLEAR Regulation requires the involvement of a special securities account, known as *Special Financial Intermediary Account*.

Upon request of the relevant participant, this account is opened in the Central Registry.

This kind of accounts is a subtype of "Individual third-party accounts" or "Proprietary accounts" and are also foreseen in article 19.2 d) of IBERCLEAR Regulation.

The Special Financial Intermediary Account will be held in the name of the Financial Intermediary and it will be used for the transitional accounting entries required for execution of the trades in which the financial intermediary is involved.

Given the instrumental and transitional nature of the entries in the Financial Intermediary Special Accounts, balances of securities may not be held in the accounts once the daily settlement processes have been completed.

In the event that IBERCLEAR receives notification evidencing the opening of insolvency proceedings against a Financial Intermediary, the balances of remaining securities at that time in the Special Financial Intermediary Account will be transferred by IBERCLEAR to the account (individual or proprietary) that the Participant had indicated will be used exclusively for the settlement of trades of this procedure.

If the participant had not indicated such exclusive use, IBERCLEAR will proceed to open an account (individual or proprietary) for the Financial Intermediary, and shall transfer to it the balance which, at that time, is in the corresponding Special Financial Intermediary Account.

If the notification certifying the bankruptcy of the Financial Intermediary were received by IBERCLEAR at a time when there was no balance of securities in its Special Financial Intermediary Account, the balance of securities existing in its individual third-party Account or in its proprietary Account and that has been delivered from the Special Financial Intermediary Account, will be transferred by IBERCLEAR to a new individual third-party Account or proprietary Account, unless the participant had indicated that the individual third-party Account or proprietary Account of the Financial Intermediary was to be used exclusively for the Financial Intermediary procedure.

Without prejudice to the right of immediate and separate execution of possible financial guarantees recognised in favour of the participant, both the individual third-party Account or proprietary Account that was indicated to be used exclusively for the aforementioned procedure or the new individual third party Account or proprietary Account opened by IBERCLEAR will remain unavailable and subject to the decisions adopted by the insolvency judge, the administrator and the Spanish National Securities Market Commission. However, the participant managing the account may request the transfer of a certain balance of securities in order to settle any pending transactions and which form part of the special financial intermediary procedure.

To the extent that these are transactions in the process of being settled, the provisions of article 15.2 LMV shall apply:

*“2. For the purposes of the provisions of this article, the insolvency judge and the bodies involved in the bankruptcy proceedings shall ensure the rights arising from transactions in the process of being settled when the insolvency of any of the entities referred to above is declared, in accordance with the rules of the corresponding clearing, settlement and registration system.”*

## SUMMARY TABLE OF THE INFORMATION PROVIDED

<b>Account type</b>	<b>Rule 38 CSDR</b>	<b>Cost</b>	<b>Legal implications</b>	<b>Insolvency of participant</b>	<b>Regulatory references</b>
Proprietary account	Segregation of participant own securities	150/300€	Ownership will be recognised	As part of the debtor's assets, these will form part of the overall assets of the insolvency	9 LMV 32 RD 878/2015 19 IBC Regulations 76 Insolvency Act
Individual Third-party Account	Segregation in individual account	150/300€	Ownership will be recognised	Right of transfer by owner	9, 15 and 102 LMV 32 RD 878/2015 19 IBC Regulations
General Third-Party Account	Segregation in omnibus accounts - requires the corresponding breakdown in the detailed registries of the participant	150/300€	Ownership derived from the entry in detailed registries the participant is recognised	Right of transfer by owner. If deficit: pro-rata distribution in General Third Party Accounts	9, 15 and 102 LMV 32 RD 878/2015 19 IBC Regulations
Special Financial Intermediary proprietary Account	Individual third-party account specialty for special and optional settlement proceedings	150/300€	Transitional and instrumental book-entries of securities balances in the process of being settled	Transaction in the process of settlement	9, 15 and 102 LMV 32 RD 878/2015 19 IBC Regulations
Special Financial Intermediary Account	Individual third-party account specialty for special and optional settlement proceedings	150/300€	Transitional and instrumental book-entries of securities balances in the process of being settled	Transaction in the process of settlement	9, 15 and 102 LMV 32 RD 878/2015 19 IBC Regulations