

A Guide on the Appointment and Responsibilities of a Customs Agent



BIFA is issuing the following guidance to assist Members in understanding their legal responsibilities and liabilities as a Customs agent.



From 1st January 2021, the main law governing Customs activities changed from being EU Directive 952/2013 to the Taxation (Cross Border Trade) Act 2018 (TCTA 2018). If only because of the additional number of Customs declarations after the UK exits the EU and the unfamiliarity to some of the new procedures, the risk to Members has increased.

One of the best ways to mitigate that risk is to ensure that the BIFA STC are fully incorporated in all contracts and that Members fully understand the legal implications of being a “Customs Agent” and the rules of “Establishment”.

Clause 7 of the BIFA Standard Trading Conditions 2021 edition states “In all and any dealings with HMRC, for and on behalf of the UK established Customer and/or Owner, the Company is deemed to be appointed and duly empowered to act as a Direct Customs Agent only, to make Customs declarations in the name of the Customer (Principal) as their “Direct Agent”.”

In certain cases where a Delivered Duty Paid (DDP) shipment is being imported into the UK or an Ex Works (EXW) shipment is leaving the UK, the customer may be based outside of the UK (i.e. the overseas shipper or consignee respectively) and thus this Clause is not likely to be applicable.

There are four converging factors that increase the likelihood that the forwarder will have to act as an Indirect representative more frequently than previously was the case:

- 1 Modern trade patterns
- 2 Commercial power of large traders
- 3 Incoterms
- 4 Changes in Customs legislation

Impact of the Taxation (Cross Border Trade) Act 2018

The Taxation (Cross Border Trade) Act 2018 (TCTA 2018) uses subtly different language from the Union Customs Code that it replaced. The Term “Customs Representative” is now replaced by “The Customs Agent” although the concept remains largely the same.

From our Members’ viewpoint the most important clause of the Act is Section 21 Customs Agents where it is stated:

- 21 (1) A person (“the principal”) may appoint any other person (a “Customs Agent”) to act on the principal’s behalf for the purposes of this Part, and
- a) The agent may make Customs declarations in the name of the principal (and in that case the agent acts as a “direct agent”) or
 - b) The agent may make Customs declarations in the agent’s own name (and in this case the agent acts as an “indirect agent”)

Within this section of the Act there is considerable emphasis on “the appointment of a person as a Customs agent”.

At this point we have to emphasise that the word “appointment” from HMRC’s viewpoint would involve positive empowerment. For single one-off consignments ticking a box to state that the customer has seen, read, understood and accepted BIFA Terms including Clause 7 is likely to be acceptable. However, where a longer business relationship is envisaged a separate form of empowerment/authorisation should be carefully considered. A suggested form of words is included at the end of this document.

Section 21 (3) clearly states “The effect of an appointment of a person as a Customs agent is that anything done under, or otherwise for the purposes of, this Part by, or in relation to, the agent is regarded as done under, or otherwise for the purposes of, this Part by, or in relation to, the principal (and not by the agent)”. As direct agent the Customs agent is acting in the name of and behalf of “the principal”.

Section 21 (4) and (5) refer to the liabilities of the Customs agent as an indirect agent highlighting that they are jointly and severally liable for the payment of import duty.

Direct v. Indirect Customs Agent

As we have seen the TCTA 2018 allows the Customs agent to be appointed on either a direct or indirect basis. In reality when acting for a party established outside the UK, the Customs agent will be appointed on an indirect basis, whilst it may be direct when appointed by an UK based entity.

BIFA has identified four main scenarios:

- Direct Representation when appointed by an UK based entity
- Indirect Representation when representing an UK based entity
- Indirect Representation when acting for an entity established outside the UK
- Self-Representation if the forwarder is importing goods on their own behalf.



It is essential that the Customs agent understands the fundamental difference between being a Direct and Indirect Customs Agent and how this impacts on their responsibilities and liabilities.

Direct Customs Agent

In this scenario the Customs agent acts in the name of and on behalf of another party. The party being represented is the declarant and is obliged to meet all the obligations arising from the declaration. The declarant will be responsible for maintaining the Customs records and also providing an audit trail.

At this point it is important to dispel one myth that has developed: that a Customs agent has no responsibility should they make an error. If the represented party has given clear and accurate instructions and the Customs agent makes an error the latter will not be able to rely on the protection of being a direct agent. Section 21 (6) (d) clearly states “(if a liability to import duty is incurred by reference to the importation of goods declared for a Customs Declaration and the declaration was not made in accordance with regulations” that “the agent is also liable for the import duty”. The view of HMRC is that they have failed to act in a competent manner and become jointly and severally liable for the debt.

Indirect Customs Agent

In this case the Customs agent acts on behalf of another person but acts in their own name. It is incumbent on the indirect Customs agent to maintain a full audit trail with regard to the Customs declaration. In this case the agent is jointly and severally liable for all Customs liabilities arising from the Customs related transactions.

Liabilities when acting as Customs agent for a non-UK based entity

In this scenario the freight forwarder when acting as a Customs representative must remember:

- That when acting as a Customs agent for a party based outside the UK, Customs are most likely to pursue the Customs agent because there is no other UK based party to take action against.
- The Customs agent should ensure that they have contractual arrangements in place to protect them from any non-compliance by their customer.

Particular attention is drawn to Clause 20 (A) of the BIFA STC under which Members are indemnified by their customers for “...(all duties, taxes, imposts, levies and outlays of whatsoever nature levied by any authority in relation to the Good(s) arising out of the Company (BIFA Member) acting in accordance with the Customer’s instructions.....” This Clause does provide some protection from the potential pitfalls that a Member may find themselves in when handling consignments for a non-UK established entity. However, as these terms are contractual, the Member may still have to take legal action against their customer in order to enforce their contractual rights. It is important not to underestimate the Customs agent’s liability relative to non-compliance and the determination of HMRC to pursue outstanding liabilities.

The most common problems reported to BIFA involve:

- Misdeclaration of the goods
- Under declaration of value
- Issues relative to origin rules
- Other valuation issues
- Anti-dumping duty infringements.

Any one of these problems, when discovered post clearance, is likely to lead to the Customs agent incurring considerable additional administrative costs and debt, which will have to be paid and subsequently recovered by them.

Appointing a direct “Customs agent”

It has always been the case that the Customs agent has had to be appointed to act on a trader’s behalf. The law is explicit, Section 21 of the of TCTA 2018 specifically refers to “The appointment of a person as a Customs agent.”

Having discussed this point with HMRC it is clear that the Department is looking for the trader to have given a positive “appointment” to the Customs agent to act on their behalf and to specify whether it would be on a direct or indirect basis. When pressed it was evident that the engagement should be in writing and this would include e-mails, traceable electronic messages and a formal signature on a document. However, HMRC place considerable importance on the fact that the signatory is duly authorised by the company on whose behalf they are signing and still prefer “original” over electronic signatures.

This appointment can be either open ended covering multiple shipments over an unspecified time frame or can be limited to a single shipment.

As previously stated, Clause 7 of the BIFA Standard Trading Conditions states that “In all and any dealings with HMRC for and on behalf of the Customer and/or Owner, the Company is deemed to be appointed, and acts as, Direct representative only.” Where the trader is a UK based customer of the BIFA Member this can be incorporated at the point that a trading account is set up for the customer by the forwarder. The key point is that the customer has to acknowledge receipt, understanding and acceptance of the BIFA Standard Trading Conditions in writing as the contractual basis upon which business will be conducted, and the appointment of the Member as “Customs agent”.

However, consideration should be given to having a specific separate “appointment” document in place. This could cover scenarios such as authorising the sub-contracting of a Customs clearance etc.

Most problems are likely to occur where there is a business interaction between the forwarder and another entity but no contract. One common example is for instance between a forwarder and an ex-works shipper. The Ex-Works shipper can appoint the forwarder to act as their Customs agent using a letter of appointment.

Appointment as an indirect agent

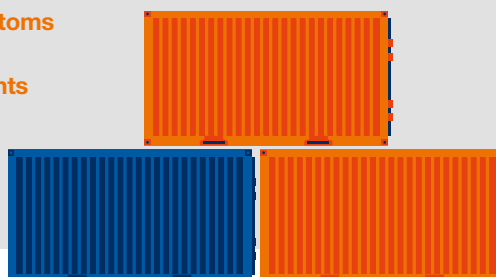
BIFA’s guidance is that Members should always seek to be appointed to act as a direct agent for a UK trader when acting on their behalf. However, there are some scenarios where this may not be possible. Before acting as an Indirect agent careful consideration should be given to two key points:

- Is the Member willing to act as an indirect agent?
- The contract detailing responsibilities, entitlements and penalties that will underpin the appointment

Due to the wide variations in how businesses conduct their commercial activity BIFA can only give generic guidance on the contractual aspects of any agreement. The BIFA Member should consider the following points:

- Align any contractual arrangements as closely as possible with the BIFA Standard Trading Conditions, paying particular reference to Clauses 7, 17(A) (i) and 20(A)
- Clearly identify both parties to the contract and subsequent empowerment
- Specify the procedures to be followed:
 - o Specify instructions to be given to the Customs representative
 - o Include clauses to cover what the consequence will be of not following the process
 - o Detail liabilities for both parties should information prove to be inaccurate
- Jurisdiction and dispute resolution clauses
- When handling DDP shipments from an office/agent abroad specific terms should be written into the agency agreement.

The appointment of a customs agent can be open ended covering multiple shipments over an unspecified time frame or can be limited to a single shipment.



Instructions and the preparation of the Customs declaration

It is often overlooked that when a Customs agent submits a Customs declaration that they are making a legal declaration to Customs. It is essential that this declaration is accurate in all aspects.

In order to ensure the necessary accuracy consideration must be given to how to collect the required information and how the information is obtained and in what form. It is very clear that Customs are placing increasing emphasis on compliance, which requires for an audit trail to be in place. BIFA's guidance would be to obtain as much information as possible in writing, this may be on a per consignment basis or to cover multiple transactions. The key thing is never guess or assume and always keep accurate file records including notes of any conversations.

Appointment of Sub Agent

If the agent delegates Customs clearance to a sub-agent, the agreement between the agent and the principal must make an allowance for this. If it doesn't, the sub-agent won't be empowered to directly represent the declarant and may be considered to be acting on their own behalf, and fully liable for any Customs debt that arises.

Where possible, BIFA's guidance would be for Members acting as sub-agent to obtain a copy of the original empowerment document. If that is not possible we have included a draft template to use for the appointment of a sub agent.

Impact of Establishment

Schedule 1 of the TCTA 2018 Section 2 "Eligibility of persons to make a Customs declaration" makes specific reference to the often-overlooked question of establishment. The law is clear on this stating that "persons may make Customs declarations" only if "they are established in the United Kingdom or a specified place outside the United Kingdom".

There is additional guidance on this subject which can be viewed at www.gov.uk/guidance/check-if-youre-established-in-the-uk-or-eu-for-Customs

This guidance clearly specifies the criteria that need to be met to comply with "establishment" in the UK.

For those entities that are non-established, the UK Customs agent can only act as an indirect Customs agent, with the additional liabilities that entails.

Postponed VAT Accounting

Since 1 January 2021, all VAT registered importers have been able to use postponed VAT accounting. They are not compelled to unless they import non-controlled goods and use Delayed Declarations where an EIDR is followed by a supplementary declaration submitted to CHIEF within 6 months of arrival.

Our Guidance would be that Members should always obtain written instructions from their customers as to whether they are using postponed VAT accounting or not.

Additional guidance on postponed VAT accounting can be found www.gov.uk/guidance/check-when-you-can-account-for-import-vat-on-your-vat-return



ON IMPORTER/EXPORTER LETTERHEAD

Appointment of a Direct Customs Agent

I, _____ (i)

Having authority to sign on behalf of

A (name) _____ (EORI No.) _____ (ii)

Hereby appoint

B (name) _____ (EORI No.) _____ (iii)

to act on behalf of the entity named at A above in the capacity of **direct Customs agent** in accordance with Schedule 21 Customs Agents of the Taxation (Cross Border Trade) Act 2018. This authorisation is applicable to all consignments arriving in or departing from the UK.

This Appointment applies with effect from the date of signature until revoked by the entity named at A above.

The entity named at A above authorises the Customs agent named at B to delegate Customs clearance to sub agents as a **direct Customs agent** of the declarant in all dealings with HMRC where circumstances necessitate.

The entity named at A authorises their representative, the Customs agent named at B, to declare goods to HMRC using

Deferment Approval Number: _____

VAT Number: _____

Note: In accordance with Clause 21 Customs Agents of the Taxation (Cross Border Trade) Act 2018, a Direct Customs agent acts in the name of and on behalf of another person. In relation to import/export declarations, the importer/exporter will be liable for any Customs debt arising from the declaration

Signed: _____

Position: _____

Dated: _____

Notes:

- (i) Name of person signing, who must have authority to sign on behalf of the importer or exporter.
- (ii) Legal name & EORI Trader Identification No. of importer or exporter.
- (iii) Legal name & EORI Trader Identification No. of representative or agent.

ON FORWARDER COMPANY LETTERHEAD

Confirmation of appointment of the sub agent to be the direct Customs agent of the declarant

I, _____ (i)

Having authority to sign on behalf of

A (name) Direct Customs agent to the declarant (EORI No.) _____ (ii)

Hereby confirm to

B (name) Sub agent (EORI No.) _____ (iii)

that entity A have obtained from our client written authority to act as a **direct Customs agent** on their behalf in all and any dealings with HMRC, as detailed in Section 21 Customs Agents of the Taxation (Cross Border Trade) Act 2018.

The empowerment authorises entity (A) to delegate Customs clearance to sub agents as a **direct Customs agent** of the original declarant. On behalf of entity (A), we hereby confirm the appointment of entity B to act as sub agent on our behalf and authorise them in line with our empowerment to act as a **direct Customs agent** on behalf of the declarant in all dealings with HMRC.

The appointing direct Customs agent warrants that documentary evidence of original authorisations from the original declarant are retained and will be made available on request. Should any such authorisation lapse in time or be revoked by company A's customer, the sub agent will be advised immediately.

Both entities named above agree that this empowerment and the resultant commercial contracts will be transacted under and subject to the current edition of the BIFA STCs.

Signed: _____

Position: _____

Dated: _____

Notes:

- (i) Name of person signing, who must have authority to sign on behalf of the entity
- (ii) Legal name & EORI Trader Identification No. of appointing direct Customs agent
- (iii) Legal name & EORI Trader Identification No. of representative or sub agent