

Direct and Indirect Representation 2021

Do you act as an Indirect Customs Agent? You may be acting on this basis without realising it or without understanding its full implications, which can be costly. A 2021 edition of BIFA's Standard Trading Conditions has been issued and we recommend that all BIFA members transfer to it as soon as possible as the main law governing customs activities changed from 1st January 2021 from the EU Directive 952/2013 to the Taxation (Cross Border) Trade Act 2018 (TCTA 2018).



The BIFA 2021 Standard Trading Conditions now state in Clause 7:

"In all and any dealings with HMRC, for and on behalf of the UK establisher Customer and/or Owner, the Company (BIFA Member) 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."

This can only apply where the customer is based within the UK and will not apply to customers based in the EU or elsewhere.

Under the Taxation (Cross Border) Trade Act 2018 (TCTA 2018), the agent can be appointed to make a customs declaration either in the name of the principal as a 'direct agent' or in the agent's own name as an 'indirect agent'. HMRC require this to be a 'positive' appointment of the Customs Agent clearly specifying whether the appointment is on a Direct or Indirect basis.

When acting for a party established outside the UK, the representation is Indirect and it is Direct when appointed by an UK based entity. It is essential to understand the fundamental difference between Direct and Indirect representation and how this impacts responsibilities and liabilities.

Direct Representation

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 records and also providing an audit trail. A Customs Agent may have a liability if they make an error on the entry as in HMRC's view they have failed to act in a competent manner and become jointly and severally liable for the debt.

Appointment - If undertaking a single ad hoc entry an acknowledgement from the customer that they have seen, read, understood and accepted BIFA terms including Clause 7 would be sufficient with the key point being that the customer must provide the acknowledgement and this acknowledgement must then be retained.



For further information, please contact Hazel Downes - Freight & Marine Manager
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Direct and Indirect Representation

If undertaking regular work for a customer we would strongly recommend a separate document giving the Customs Agent empowerment to act is put into place which can be open ended covering an unlimited number of shipments.

Failure to obtain the correct empowerment will create a situation where the Customs Agent is self-representing with full liability for the customs declaration.

Indirect Representation

The Customs Agent acts on behalf of another person but acts in their own name. The Customs Agent must maintain a full audit trail of the customs declaration.

The Indirect representative shall be 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

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.

Indirect representative when acting on behalf of a UK based entity

In this scenario, the Customs Agent is in a stronger position than if they are acting for a non-UK based customer as there is another party based in the UK for HMRC to pursue for the debt.

Appointment - When acting as an Indirect representative for a UK based company there are two aspects to consider: the empowerment to act as a Customs Agent and the contract detailing responsibilities, entitlements and penalties that will underpin the empowerment.

There is a level of protection under BIFA Clause 20 (A) where a BIFA Member is indemnified for:

“..all duties, taxes, imposts, levies, deposits and outlays of whatsoever nature levied by any authority in relation to the goods arising out of the Company (BIFA Member) acting in accordance with the Customer’s instructions...”.



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This is no guarantee that a non-UK entity would simply comply and the BIFA Member may still have to pursue their customer to enforce the conditions to be able to rely on this protection and therefore a separate contract agreement covering the responsibilities would be of great benefit.

Any contract should, where possible, align with the BIFA 2021 terms particularly Clauses 7, 17(A) (i) and 20(A), which clearly identifies the parties and subsequent empowerment, specifies the procedures to be followed (the instructions that must be provided to the Customs Agent, provisions for failure to provide correct instructions and detail liabilities should information be inaccurate) and the jurisdiction and dispute resolution (UK).

When acting for a party based outside the UK, as the exporter/seller’s representative the Customs Agent will be fully liable and thus self-representing.

Empowerment

Documentary evidence must be available of a positive written engagement of a Customs Agent whether this is Direct or Indirect, regardless if this is on an open ended or for a single shipment, which can be a completed form, letter or e-mail. This can include a written acceptance of BIFA’s Standard Trading Conditions where under Article 7, the customer appoints the BIFA Member to act as a Customs Agent. Failure to obtain the correct empowerment will create a situation where the Customs Agent is self-representing with full liability for the customs declaration.

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 does not, the sub-agent will not be empowered to directly represent the principal and will be considered to be acting on their own behalf, and fully liable for any customs debt that arises.

Further information is available on www.bifa.org in *Guidance on the Appointment and responsibilities of a Customs agent* which is located in the Good Practice Toolbox. There are more detailed instructions and sample letters to facilitate these contracting and empowerment requirements.