# AWRS Law and HMRC Guidance

**The Law**

1. The legislative provisions underpinning the AWRS can be found in Part 6A of the *Alcoholic Liquor Duties Act 1979* (ALDA) (inserted by s.54 of the *Finance Act 2015*) and the *Wholesaling of Controlled Liquors Regulations 2015*.

'Fit and Proper' Test

2. HMRC provided guidance on their approach to the issue of 'fit and proper' for the purposes of the AWRS. This has come in the form of 'detailed guidance' that was issued in 23 March 2015 and in Public Notice 2002, published 30 November 2015. The guidance sets out 10 factors that HMRC will consider when assessing whether a business is 'fit and proper'.

3. The listed factors fall into two broad categories being (1) those that relate to current activity and (2) those that relate to past events. Factors in the first category include: (a) there is no evidence of illicit trading; (b) there are no connections between the applicant (or key persons involved with the business) and any other non-compliant or fraudulent business; (c) the application is complete and accurate; (d) the business has provided sufficient evidence of its commercial viability and its credibility; (e) there are no outstanding unmanaged HMRC debts; and (f) the business has in place satisfactory due diligence procedures to protect it from trading in illicit supply chains. Factors in the latter category include: (a) key persons involved in the

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business have no relevant unspent convictions; (b) the applicant (or a person involved in the business) has not previously been involved in significant non-compliance or fraud; (c) there has not been persistent or negligent failures to comply with HMRC record keeping requirements; and (d) the applicant has not previously been involved in unauthorised wholesaling.

4. Public Notice 2002 provides:

> *'Only applicants who can demonstrate that they're fit and proper to carry on a controlled activity will be granted approval. This means HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don't pose any significant threat in terms of potential revenue non-compliance or fraud.'*

*'HMRC will assess all applicants (not just the legal entity of the business but all partners, directors and other key persons) against a number of 'fit and proper' criteria to establish:*

- there's no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:

- *assessments for duty unpaid stock or for other under-declarations of tax that suggest there's a significant risk that the business would be prepared to trade in duty unpaid alcohol*

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- *seizures of duty unpaid products*
- *penalties for wrongdoing or other civil penalties which suggest a business don't have a responsible outlook on its tax obligations*
- *trading with unapproved persons*
- *previous occasions where approvals have been revoked or refused for this or other regimes (including liquor licensing etc)*
- *previous confiscation orders and recovery proceedings under the Proceeds of Crime Act*
- *key persons have been disqualified as a director under company law*
- *there are no connections between the businesses, or key persons involved in the business, with other known non-compliant or fraudulent businesses*
- *key persons involved in the business have no criminal convictions which are relevant for example, offences involving any dishonesty or links to organised criminal activity - HMRC will normally disregard convictions that are spent provided there are no wider indications that the person in question continues to pose a serious threat to the revenue (an 'unspent' conviction is one that has not expired under the terms of the Rehabilitation of Offenders Act 1974)*
- *the application is accurate and complete and there has been no attempt to deceive*
- *there haven't been persistent or negligent failures to comply with any HMRC record-keeping requirements, for example poor record keeping in spite of warnings or absence of key business records*
- *the applicant, or key persons in the business, have not previously*

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*attempted to avoid being approved and traded unapproved*

- *the business has provided sufficient evidence of its commercial viability and/or credibility - HMRC won't approve applicants where they find that they cannot substantiate that there's a genuine plan to legitimately trade from the proposed date of approval*
- *there are no outstanding, unmanaged HMRC debts or a history of poor payment*
- *the business has in place satisfactory due diligence procedures covering its dealings with customers and suppliers to protect it from trading in illicit supply-chains, see section 12 for more information about due diligence.*

*The list above isn't exhaustive. HMRC may refuse to approve you for reasons other than those listed, if they have justifiable concerns about your suitability to be approved for AWRS.*

*HMRC are also unlikely to approve an application if the applicant has previously had their application for AWRS approval refused if the reasons for the previous refusal are still relevant.'*

5. However, the presence of one or more of the 'negative indicators' set out above, should not automatically mean that a trader's application is refused. HMRC is obliged to consider each case individually and should not adopt a blanket approach such as to give the impression that it has fettered its discretion as it was found to have done in *Eastenders Cash and Carry Plc v HMRC* (LON/2008/8113).

*6.* In that case, Eastenders' application for registration under the WOWGR regime had been refused on the basis that its two directors and shareholders had unspent

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convictions for offences involving the fraudulent evasion of duty. The First Tier Tribunal ('FTT') allowed the Appellant's appeal having found that '[the HMRC officer's] *decision took account only of the convictions…There is no evidence that any other factors were taken into consideration…It does not matter why he considered one factor and not others; it only matters whether he failed to take into account matter which he should have done'*.

7. The guidance also makes clear that HMRC may refuse approval for reasons other than those listed if there are concerns that the applicant is a serious risk to the revenue. However, these concerns have to be objectively justifiable by reference to material that HMRC is willing to adduce before the Tribunal, otherwise HMRC's decision is liable to be overturned on appeal. In Grapevine Storage Services Ltd v. HMRC (LON/2003/8089), HMRC refused a WOWGR application ostensibly on the basis that the business was not commercially viable. However, in addition to finding that the officers had misunderstood the financial information presented, the VAT and Duties Tribunal found:

> *'the decision was in reality based on the perceived but mistaken view that there had been fraudulent activity at Oakwoods and the directors of Grapevine were more intimately connected with …Oakwoods than was in fact the case…[the officers] took the view that there was insufficient evidence which could properly be used in a tribunal hearing to justify a refusal on the grounds of perceived fraudulent activity and therefore looked for other reasons to refuse the application'*.

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8. Further, HMRC must act proportionately and should consider whether any concerns that exist about an applicant could be allayed by granting an approval subject to conditions (see *Eastenders* cited above).

Please talk to a CTM legal expert if you have any questions at all, or speak directly to the author of this report and Director of Tax Disputes, Liban Ahmed, on 07738 666548.

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