

O-499-12

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NUMBER 2573142**

**BY BELFAST INTERNATIONAL AIRPORT LIMITED**

**TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 35, 36, 37, 38, 39, 42, 43,  
45:**

**BELFAST INTERNATIONAL AIRPORT**

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**TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 35, 36, 37, 38, 39, 42, 43, 45:**

**BELFAST INTERNATIONAL AIRPORT**

**Background**

1. On 23 February 2011, Belfast International Airport ('the applicant') applied to register the trade mark shown above for the following services.

Class 35: Advertising; business management; business information; office functions; promotional services; providing space for the advertising/promotion of goods and services to others; business advisory services; compilation of catalogues and directories, provision of corporate and business related information; duty free retail services and/or retail services provided in retail outlets at airport/travel terminals, all connected to fragrances, beauty products, cosmetics, pharmaceuticals, skincare products, alcoholic and non-alcoholic beverages, confectionery, biscuits and cakes, preserves, foodstuffs, sunglasses, jewellery, handbags, articles of clothing, footwear and headgear, bags, luggage, wallets and cases, toys, games and playthings, household or kitchen utensils and containers, glassware, porcelain and earthenware, pillows, blankets, cameras, apparatus and instruments for recording, transmission or reproduction of sounds or images, magnetic data carriers, CD-Roms, electronic games, calculators, computers, computer software, plug adaptors, pharmaceutical products; the bringing together for the benefit of others of a variety of goods namely fragrances, beauty products, cosmetics, pharmaceuticals, skincare products, alcoholic and non-alcoholic beverages, confectionery, biscuits and cakes, preserves, foodstuffs, sunglasses, jewellery, handbags, articles of clothing, footwear and headgear, bags, luggage, wallets and cases, toys, games and playthings, household or kitchen utensils and containers, glassware, porcelain and earthenware, pillows, blankets, cameras, apparatus and instruments for recording, transmission or reproduction of sounds or images, magnetic data carriers, CD-Rams, electronic games, calculators, computers, computer software, plug adaptors, pharmaceutical products, enabling customers to conveniently view and purchase those goods in airport/travel terminals or airport/travel terminal retail outlets, tax or duty free outlets, a shopping mall, or from an internet website specialising in the sale of duty or tax free goods or from a general merchandised Internet website, a general merchandise catalogue or by mail order or by telecommunications; the development and management of retail operations (including food/drink retail outlets), commercial undertakings and airports and advisory services relating thereto; consultancy services in the retail field; introduction of business and trade contacts; organisation, operation and supervision of sales incentive schemes, loyalty and/or promotional incentive schemes; hire, leasing or rental of office equipment; provision of office facilities; business and management consultancy services; airport administration services, provision of business assistance for airport facilities; services for the storage and processing of data and of information by

## O-499-12

electronic computer, cable, teleprinter, teletype, electronic mail, television, microwave, laser beam and/or communications satellite means.

Class 36: Real estate affairs; rental, leasing and management of commercial premises, retail outlets, shops and offices; currency exchange services and currency ordering services and information relating thereto, credit/debit and charge card services, insurance (including travel insurance) services and information services relating thereto, provision of discount services, issuance and redemption of points/tokens of value; estate agency services; bureaux de change services and banking services.

Class 37: Building, construction, repair; installation services; construction services including such services relating to construction of airports, airfields, runways, terminals, piers, jetties, stands, taxiways, surface and/or subterranean rail access, roads; site clearance services; construction and installation of infrastructure, communications and/or data networks; cleaning services; construction management services; onsite project management services; onsite project management relating to the construction of major infrastructure projects; onsite project management relating to the construction of airport facilities; consultancy services relating to the construction of airports and airport facilities; refurbishment services; property development services and advisory services relating thereto; property development services; on-site project management services relating to construction, building, refurbishment and development; project management services relating to construction, building, refurbishment and/or development; off-site project management services relating to construction, building, refurbishment and development.

Class 38: Telecommunication services; communications services; provision of access to common voice and/or data communications networks; provision of access to voice and/or data communications facilities; broadcasting services; transmission of data; hire, leasing or rental of apparatus, instruments and/or installations for communication purposes; Providing internet chatrooms; providing chat rooms for transmission of messages, images and information on a website, a television channel, or other electric/electronic device; provision of interactive online services; electronic bulletin board services; cable radio broadcasting; cable radio transmission; radio broadcasting; telecommunications services; services for the transmission of data and of information by electronic computer, cable, teleprinter, teletype, electronic mail, television, microwave, laser beam and/or communications satellite means; services for the transmission, provision or display of information for business or domestic purposes from a computer-stored data bank; services for the broadcasting or transmission of television programmes, cable television or satellite programmes; services for the generation, display, monitoring, manipulation, transmission, broadcasting, reception and networking of electronic and computer-generated images and sound; provision of facilities for on-line information services; communications by computer terminals; computer aided transmission of messages; electronic data interchange services; provision of information relating to all of the aforesaid services; telecommunications.

Class 39: Transport; packaging and storage of goods; travel arrangements; airport services; airport ground support services; ground and air traffic control services; aircraft runway services; airfield management services; management of airfield operations; aircraft parking; aircraft stand allocation; aircraft apron services; ground support services

## O-499-12

provided to aircraft at aircraft aprons (parking areas) as well as provision of airside passenger reception, check-in and transport services and passenger boarding and disembarking services; aircraft stand allocation, namely allocation of parking places for aircraft when they land or are preparing to load or board passengers; aircraft trucking; inspection of aircraft; aircraft fuelling services; aircraft handling; provision of reception and waiting areas for passenger departure and arrival; provision of flight information; cargo/freight handling; electricity, gas and water supply; storage, loading and handling of luggage; check-in services; passenger and/or freight transport by air, road or rail; taxi services, taxi booking and information services, car parking, car parking booking and information services, car/vehicle rental services and car/vehicle rental booking and information services, bonded warehousing; tour operating, tourist office/tourist agency services; advisory and information services relating to travel, airport information services and flight information services; booking or reservation of seats/tickets for travel; hire of land vehicles, and of drivers therefor; car parking; bonded warehousing.

Class 42: Off-site project management services relating to construction, building, refurbishment and development; architectural, design and surveying services.

Class 43: Cafe, restaurant, bar and catering services; services for the provision of temporary accommodation; hotels, motels, boarding houses; rental of meeting rooms; reservation and booking services for all the aforesaid services.

Class 45: Chaperoning services; personal shopper services; baby-sitting services; concierge services, namely the provision of assistance to, from and around airports; escorting, chaperoning or baby-sitting services for special needs passengers, namely wheelchair and buggy assistance, assisting special needs customers and the less mobile around airports; security services for the protection of property and individuals; surveillance services, airport fire services, airport security services; safety services; baggage screening services; screening of individuals; information and advisory services in the field of security and/or safety; security control services; border and immigration control services, namely passenger and staff security services, checking of immigration papers and identity validation of passengers and staff.

2. On 14 March 2011, the Intellectual Property Office ('IPO') issued an examination report in response to the application. In the report, a partial objection was raised under sections 3(1)(b) and (c) of the Trade Marks Act 1994 ('the Act'), on the basis that the mark consists exclusively of the term 'Belfast International Airport', being a sign which may serve in trade to designate the kind of the services e.g. services relating to Belfast International Airport. The objection was raised in respect of the following services in class 39:

Transport; travel arrangements; transport services; passenger transport by road or rail; taxi services, taxi booking and information services, car parking, car parking booking and information services; advisory and information services relating to travel; booking or reservation of seats/tickets for travel; car parking.

3. On 9 May 2011, Arnold & Porter (UK) LLP, acting as the applicant's representative, wrote to IPO requesting that the objection should be reconsidered in light of several precedents

which had been accepted for registration, including the marks Liverpool Airport, Birmingham International Airport, Manchester Airport, Heathrow Airport and Gatwick Airport.

4. The examiner was not persuaded to waive the objection in view of the precedents and maintained the objection. On 20 July 2011 an *ex parte* hearing was requested and arranged for 14 November 2011.

5. At that hearing, the objection was maintained and a period of two months was granted to allow Mr Jonathan Critchley (the agent) time to consider limiting the wide terms claimed such as 'transport services'. A further extension of time was then provided, allowing the applicant to gather evidence before deciding whether or not to appeal the Registrar's decision.

6. On 15 May 2012, Arnold & Porter wrote to the Registrar stating that the applicant did wish to appeal. The applicant was then duly instructed to submit a form TM5 requesting a statement of reasons for the Registrar's decision, which was received at IPO on 10 July 2012.

7. I am now asked under section 76 of the Trade Marks Act 1994 and rule 69 of the Trade Marks Rules 2008, to state in writing the grounds of my decision and the materials used in arriving at it. No formal evidence has been put before me for the purposes of demonstrating acquired distinctiveness. Therefore, I have only the *prima facie* case to consider.

#### **The applicant's case for registration**

8. Prior to setting out the law in relation to sections 3(1)(b) and (c) of the Act, I must emphasise that the following decision will set out my reasons for maintaining the objection by reviewing and assessing the mark applied for. Prior to refusal of the application, the arguments put forward in support of *prima facie* acceptance were those made in writing by the applicant's representative on 9 May 2011, and also those made orally at the hearing. In the written correspondence, it was submitted that the objection should be reconsidered in view of several precedents. At the hearing, Mr Critchley submitted that there is a very fine line between use of the sign descriptively and use as a distinctive trade mark. To support his view, and with reference to *Fox International Group Ltd v Jay Folly* [2010] EWPC 30, it was submitted that signs which may be descriptive can still function as a trade mark if used in such a way that indicates the origin of the services. Mr Critchley also made reference to the decision of the Court of Justice in the European Union ('CJEU') C-100/02 *Gerolsteiner Brunnen GmbH & Co. v Putsch GmbH* and submitted that registration of a descriptive sign does not prevent its use of by third parties provided that such use is in accordance with honest practices.

9. Much of Mr Critchley's argument regarding the mark's alleged inherent distinctiveness - both in his written submissions and at the hearing - are based upon the principle of equal treatment set by earlier acceptances.

#### **The Law**

10. Section 3(1) of the Act reads as follows:

“3.-(1) The following shall not be registered -

(a) ...

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d) ...

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.

The above provisions mirror Articles 3(1)(b) and (c) of First Council Directive 89/104 of 21 December 1988. The proviso to section 3 is based on the equivalent provision of Article 3(3).

#### **Decision - Section 3(1)(c)**

11. With regard to Mr Critchley's submissions based on the principle of 'equal treatment'. Whilst I acknowledge these submissions, I have assessed the mark on its own merits and therefore attach limited significance to the fact that other 'airport' marks have already been registered.

12. As regards those earlier marks registered by the Intellectual Property Office, I am unaware of the circumstances surrounding their acceptance, and consider them to be of little assistance in determining the outcome of this application. I draw support for this from the judgement of Jacob J in *British Sugar* [1996] RPC 281 at 305 where he stated the following:

"Both sides invited me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word "Treat". I do not think this assists the factual enquiry one way or the other, save perhaps to confirm that this is the sort of word in which traders would like a monopoly. In particular the state of the register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led the registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. *MADAME* Trade Mark and the same must be true under the 1994 Act. I disregard the state of the register evidence."

13. In *JanSport Apparel Corp v Office for Harmonisation in the Internal Market* (Case T-80/07) the General Court gave a helpful summary of the considerations to be taken into account in relation to Article 7(1)(c) of the regulation, the equivalent of section 3(1)(c) of the Act:

"18. Under Article 7(1)(c) of Regulation No 40/94, „trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service’ are not to be registered.

19. By prohibiting the registration of such signs, that article pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is sought may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (Case C-191/01 P *OHIM v Wrigley* [2003] ECR I-12447, paragraph 31).

20. Furthermore, the signs covered by Article 7(1)(c) of Regulation No 40/94 are signs regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the consumer who acquired the product or service to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (Case T-219/00 *Ellos v OHIM* (ELLOS) [2002] ECR II-753, paragraph 28, and Case T-348/02 *Quick v OHIM* (Quick) [2003] ECR II-5071, paragraph 28).

21. The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are thus only those which may serve in normal usage from a consumer’s point of view to designate, either directly or by reference to one of their essential characteristics, goods or services such as those in respect of which registration is sought (see the judgment of 9 July 2008 in Case T-323/05 *Coffee Store v OHIM* (THE COFFEE STORE), not published in the ECR, paragraph 31 and the case-law cited). Accordingly, a sign’s descriptiveness can only be assessed by reference to the goods or services concerned and to the way in which it is understood by the relevant public (Case T-322/03 *Telefon & Buch v OHIM - Herold Business Data* (WEISSE SEITEN) [2006] ECR II-835, paragraph 90).

22. It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see Case T-19/04 *Metso Paper Automation v OHIM*(PAPERLAB) [2005] ECR II-2383, paragraph 25 and the case-law cited).

23. It must finally be pointed out that the criteria established by the case law for the purpose of determining whether a word mark composed of several word elements is descriptive or not are identical to those applied in the case of a word mark containing only a single element (Case T-28/06 *Rheinfelsquellen H. Hövelmann v OHIM* (VOM URSPRUNG HER VOLLKOMMEN) [2007] ECR II- 4413, paragraph 21)."

14. Of particular relevance to this case, the leading authority on geographical names is the judgment of the CJEU in *Windsurfing Chiemsee* (Joined cases C-108/97 and C-109/9 'Chiemsee') where it was stated:

"37. In view of the foregoing, the answer to the questions on Article 3(1)(c) of the Directive must be that Article 3(1)(c) is to be interpreted as meaning that:

- it does not prohibit the registration of geographical names as trade marks solely where the names designate places which are, in the mind of the relevant class of persons, currently associated with the category of goods in question; it also applies to geographical names which are liable to be used in future by the undertakings concerned as an indication of the geographical origin of that category of goods; - where there is currently no association in the mind of the relevant class of persons between the geographical name and the category of goods in question, the competent authority must assess whether it is reasonable to assume that such a name is, in the mind of the relevant class of persons, capable of designating the geographical origin of that category of goods;
- in making that assessment, particular consideration should be given to the degree of familiarity amongst the relevant class of persons with the geographical name in question, with the characteristics of the place designated by that name, and with the category of goods concerned;
- it is not necessary for the goods to be manufactured in the geographical location in order for them to be associated with it."

15. In relation to section 3(1)(c), and in relation to the issue of geographical designations, *Chiemsee* highlights that the public interest pursues an aim of ensuring that geographical names which may serve to designate the geographical origin of the relevant goods/services remain free for the use by other traders. The Court stated further in *Chiemsee*:

"25. However, Article 3(1)(c) of the Directive pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the categories of goods or services in respect of which registration is applied for may be freely used by all, including as collective marks or as part of complex or graphic marks. Article 3(1)(c) therefore prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks.

26. As regards, more particularly, signs or indications which may serve to designate the geographical origin of the categories of goods in relation to which registration of the mark is applied for, especially geographical names, it is in the public interest that they remain available, not least because they may be an indication of the quality and other characteristics of the categories of goods concerned, and may also, in various ways, influence consumer tastes by, for instance, associating the goods with a place that may give rise to a favourable response."

16. As stated in *Chiemsee*, section 3(1)(c) of the Act excludes signs which may serve, in trade, to designate the kind of services or other characteristics of the services. The objectionable services at issue here are '*transport; travel arrangements; transport services; passenger transport by road or rail; taxi services, taxi booking and information services; car parking, car park booking and information services; advisory and information services relating to travel; booking of reservation of seats/tickets for travel; car parking*' in class 39.



17. Having regard to the nature and characteristics of the transport and travel services claimed in the application, these are not specialist services and I proceed on the basis that the average consumer will be no more than reasonably circumspect in their selection.

### The Mark

18. Turning my assessment to the mark applied for, I do not consider that the words within the mark need any separate analysis. In my view, the term would be readily understood by the general public to mean an international airport which is based in Belfast, where „international airport’ means any airport which can accommodate international flights. This point is not in question. However, for the sake of completeness and to avoid any doubt as to the meanings which may be understood, I refer to the following dictionary definitions taken from Collins English Dictionary and Cambridge Dictionaries Online respectively:

**Belfast** *noun* 1. The capital of Northern Ireland.

**International airport** *noun* an airport used by international airlines, with flights to and from different countries.

19. The section 3(1) objection was also raised in full accordance with guidance published in IPO's 'Addendum to the Trade Marks Examination Guide (Chapter 6)' (formerly known as the 'Examination Work Manual', and available to view on the IPO website at [www.ipo.gov.uk/tmmanual-chap3-add.pdf](http://www.ipo.gov.uk/tmmanual-chap3-add.pdf)). In that Addendum, under the heading 'AIRPORT', the following is stated:

• **AIRPORT**

*Names of airports such as BIRMINGHAM AIRPORT will normally be acceptable for services without the need for evidence of distinctiveness to be filed. Objection should only be taken under section 3(1)(b) and (c) where specifications include 'transport services' such as shuttle buses, taxis etc as it is likely that consumers would expect there to be more than one undertaking providing transport services to and from an airport and would therefore be descriptive of the destination/intended purpose of the services.*

20. Having established that each word has a separate meaning, I am required to decide whether the combination of those words falls foul of the requirements set out in sections 3(1)(b) and (c). With that in mind, I do not believe the combination can lay claim to any grammatical or linguistic imperfection or peculiarity such as might help to escape its inherent descriptiveness. To my mind, the term „Belfast international airport’ most commonly and obviously describes an airport based in Belfast which is used by international airlines, with flights to and from different countries.

21. The section 3(1)(c) objection is therefore based on the premise that the term „BELFAST INTERNATIONAL AIRPORT’, used in respect of those services set out in paragraph 14 above, would be understood as a descriptive reference to their inherent characteristics. For example, in respect of a claim to transport services *at large*, the protection would encompass transport services *to* and *from* the airport by bus, coach, mini bus etc. In this type of scenario, the sign would do no more than serve to designate the *destination* of the transport services, or their geographical origin. Such services are frequently provided by undertakings

which have no official connection to the airport and when used in this context the term would merely designate a characteristic of the services. Similarly, in respect of „car parking’ the term would merely serve to designate facilities located at, near to, or suitable for, Belfast International Airport. The same consideration can be applied to „booking or reservation of seats/tickets for travel’ where in my view, the term would merely serve to designate that the services are again provided from an independent and/or unaffiliated undertaking located at an international airport in Belfast. In this respect, it is not unusual for several different tour operators to be based at airports, all of whom will offer booking and reservation of seats and tickets for travel from within the airport.

22. The registration of geographical names as trade marks solely where they designate specified geographical locations which are already famous, or are known for the category of goods concerned, and which are therefore associated with those goods in the mind of the relevant class of persons, are excluded from registration. This is also the case where the registration of geographical names which are liable to be used by undertakings and must remain available to such undertakings as indications of the geographical origin of the category of goods concerned.

23. The need for certain geographical designations to remain free for others to use is particularly relevant in the field of transport and travel services where, for example, an airport name is likely to be used in reference to the principal place of where these services stem from, and also as a designation of the geographical destination of the services. In my view, there would be a clear association in the mind of the relevant class of persons between the geographical name and the category of services in question, the net result being that the consumer would not, without prior education, perceive the sign as denoting trade origin.

24. In view of the fact that the terms covered are extremely broad, it is necessary to assess the distinctiveness of the sign by reference to all of the terms claimed, however broad. If there are goods specified which are free of objection under section 3(1)(b) and (c), then they must be allowed to proceed. In the case of European Case of Justice Case C- 239/05 *BVBA Management, Training en Consultancy v Benelux-Merkenbureau* the question being referred to the court was whether the Directive must be interpreted as meaning that the competent authority is required to state its conclusion separately for each of the individual goods and services specified in the application. The court answered (para 38), saying that the competent authority was required to assess the application by reference to individual goods and services. However, where the same ground of refusal is given for a category or group of goods or services, the competent authority may use only general reasoning for all the goods and services concerned. In this case I regard all of the objectionable services to be in the same category (transport and travel services in class 39), and thus rely on general reasoning in refusing the mark for the services specified.

25. In taking a reasonably broad objection against the services claimed, it should be emphasised that the Registrar did provide the applicant with an opportunity to submit a revised limited specification for further consideration at the *ex parte* hearing. However, nothing was provided in response. As a result, the Registrar considers it prudent to now confirm that this refusal applies to "Transport; travel arrangements; transport services; passenger transport by road or rail; taxi services, taxi booking and information services, car

parking, car parking booking and information services; advisory and information services relating to travel; booking or reservation of seats/tickets for travel; car parking".

26. Having found the mark to be excluded from registration by section 3(1)(c), that effectively ends the matter. However, in case I am found to be wrong in that respect, I will go on to determine the matter under section 3(1)(b). I should at this point stress that since objection has been made under section 3(1)(c), this automatically engages section 3(1)(b). However, it can be useful to also consider section 3(1)(b) in its own right - the scope of the two provisions is not identical, and marks which are not descriptive under section 3(1)(c) can nonetheless be devoid of any distinctive pursuant to section 3(1)(b).

### **Decision - Section 3(1)(b)**

27. In relation to section 3(1)(b), the ECJ held in Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* („Postkantoor”) [2004] that:

"86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regards to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive."

28. I approach this ground of objection on the basis of the following principles derived from the ECJ cases referred to below:

- An objection under section 3(1)(b) operates independently of objections under section 3(1)(c) - (*Linde AG (and others) v Deutsches Patent-und Markenamt*, Joined Cases C-53/01 to C-55/01, paragraphs 67 to 68);
- For a mark to possess a distinctive character it must identify the product (or service) in respect of which registration is applied for as originating from a particular undertaking and thus distinguish that product (or service) from the products (or services) of other undertakings (*Linde*, paragraphs 40-41 and 47);
- A mark may be devoid of distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive (*Postkantoor*, paragraph 86);
- A trade mark's distinctiveness is not to be considered in the abstract but rather by reference to the goods or services in respect of which registration is sought, and by reference to the relevant public's perception of that mark (*Libertel Group BV v Benelux Merkenbureau*, Case C-104/01 paragraphs 72- 77);
- The relevant public must be deemed to be composed of the average consumer who is reasonably well-informed and reasonably observant and circumspect (*Libertel* paragraph 46 referring to Case C-342/97 *Lloyd Schuhfabrik Meyer*).

29. The question arises as to whether the term may still be devoid of any distinctive character under section 3(1)(b) in relation to the services at issue, even though it does not precisely designate a characteristic of the services as per section 3(1)(c). In this respect the public interest underlying the provision for refusal of marks lacking distinctive character has been examined by the CJEU in Case C-104/01 *Libertel Groep BV v Benelux-Merkenbrau* [2003] (Libertel). In that case, the Court found that the public interest was “not unduly restricting the availability” of the given variety of mark for other traders. Advocate-General Jacobs, in his opinion in SAT.2, gave this further consideration and pointed out that the policy underlining CTMR Article 7(1)(b)/UKTMA section 3(1)(b) is distinct from the public interest behind Article 7(1)(c)/section 3(1)(c). He pointed out that “there is no obvious reason why signs which simply lack any distinctive character - even if that lack is not absolute but relates only to the goods and services concerned - should be kept free for general use unless the signs themselves also have some close relationship with the relevant products”.

30. In my opinion, even if the mark falls short of conveying the requisite level of specificity and objectivity to support an objection under section 3(1)(c), I would nevertheless hold that it is not capable of performing the essential function of a trade mark without the relevant public being educated into seeing it that way. In my view, consumers would not consider the mark to denote transport and travel-related services provided by any one specific provider. Rather, it would serve to provide a non-distinctive “functional” purpose, likely to be used by any number of services providers working in or around Belfast International Airport. On this basis I consider that the section 3(1)(b) objection is also made out.

31. I believe that the mark applied for will not be identifiable as an indicator of trade origin without the public being first educated to the fact. I must therefore conclude that it is devoid of any distinctive character, and thus excluded from *prima facie* acceptance under section 3(1)(b) of the Act. For reasons identical to those presented in respect of the objection under section 3(1)(c), the refusal under section 3(1)(b) applies to all of the services referred to in paragraph 16 above.

### **Conclusion**

32. In this decision, I have considered all the documents filed by the applicant and all the arguments submitted to me in relation to this application. Having done so, and for the reasons given above, the application is partially refused under the terms of section 37(4) of the Act because it fails to qualify under sections 3(1)(b) and 3(1)(c) of the Act.

**Dated this 17th day of December 2012**

**Bridget Whatmough  
For the Registrar  
The Comptroller-General**