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**D E C I S I O N**  
**of 10 January 2006**

**Case Number:** T 1259/04 - 3.2.04

**Application Number:** 00119984.3

**Publication Number:** 1085186

**IPC:** F02D 11/10

**Language of the proceedings:** EN

**Title of invention:**

Electronic throttle control system with wireless communication

**Applicant:**

Siemens VDO Automotive Inc.

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 109(1), 113(1)

EPC R. 67

**Keyword:**

"Substantial procedural violation (no)"

"Reimbursement of the appeal fee (no)"

**Decisions cited:**

G 0003/03, T 0304/91, T 0063/93

**Catchword:**

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Case Number: T 1259/04 - 3.2.04

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.04  
of 10 January 2006

**Appellant:**  
(Applicant)

Siemens VDO Automotive Inc.  
700 Park Avenue East  
Chatham, Ontario N7M 5M7 (CA)

**Representative:**

Allen, Derek  
Siemens Shared Services Limited  
Intellectual Property Department  
Siemens House  
Oldbury  
Bracknell, Berkshire RG12 8FZ (GB)

**Decision under appeal:**

Decision of the Examining Division of the  
European Patent Office posted 8 July 2004  
refusing European application No. 00119984.3  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** M. Ceyte  
**Members:** C. Scheibling  
C. Heath

## **Summary of Facts and Submissions**

- I. By its decision dated 8 July 2004 the Examining Division refused the patent application. On 27 August 2004 the Appellant (applicant) filed an appeal, a statement setting out the grounds of appeal and paid the appeal fee simultaneously.
- II. With the statement setting out the grounds of appeal, the Appellant filed new claims, an adapted description, requested that a patent be granted on the basis of the newly filed documents and that the Appeal fee be reimbursed.
- III. By its communication dated 7 October 2004 the Examining Division ordered rectification of its decision under Article 109(1) EPC and informed the Appellant that the request for reimbursement of the appeal fee, which it could not allow, would be forwarded to a Board of Appeal for decision.
- IV. According to G 3/03 (OJ EPO 2005, 344) it is the present Board which is competent to decide on the Appellant's request for reimbursement of the appeal fee.

## Reasons for the Decision

1. The appeal is admissible.
2. *Substantial procedural violation*
  - 2.1 In a first communication the Examining Division found that the subject-matter of claim 1 did not involve an inventive step.

In response to this communication the Appellant forwarded arguments to support inventiveness of the subject-matter of claim 1. He did however, neither amend the claims nor request oral proceedings should the Examining Division not agree to his arguments.

Without any further communication, the Examining Division refused the application.

- 2.2 As a matter of fact, after the reply to the first communication the Examining Division may exercise its discretionary power under Rule 86(3) EPC to reject the patent application according to Article 97(1) EPC. Since the features of claim 1, which had been considered to lack an inventive step, had remained unchanged, it had to be expected that the Examining Division would decide to refuse the application. Although a further communication might have been desirable, the Examining Division was not obliged by virtue of the provisions of the EPC or the principle of good faith, to issue a new communication or to propose a telephone interview to discuss the problem of inventive step on which it had already given a negative

ruling (see T 63/93, section 1.1, third and fourth paragraphs; T 304/91 section 5).

- 2.3 Consequently, the Examining Division did not commit a procedural violation, particularly with regard to Article 113(1) EPC, and under these circumstances the reimbursement of the appeal fee requested by the Appellant on the basis of Rule 67 EPC cannot be granted.

## **Order**

### **For these reasons it is decided that:**

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte