

How the EPO got its president

Managing IP Correspondent April 01 2010

It took six months and 20 rounds of voting but the Administrative Council of the EPO last month finally chose a successor to outgoing president Alison Brimelow

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Benoît Battistelli, head of the French IP Office INPI and former chairman of the Admin Council, secured three-quarters of the votes of EPO member states at a meeting on March 1.

National representatives were close to postponing the election of a president for a fourth time, before Battistelli finally and narrowly won the necessary level of support.

Battistelli's success came after his candidacy had gradually built up support during 20 separate votes over the four Council meetings. After the previous vote in February, he was just one short of the required threshold, and was expected to have gathered enough momentum to win the vote comfortably at the fourth attempt.

But, says one Admin Council member: "The [final] vote was not a formality. We had a number of votes that went up and down. It involved very small margins."

The acting chair of the Admin Council, Jesper Kongstad of Denmark, told *Managing IP*: "I told the Council we might be sitting here for a long evening. I had always been very clear that we wanted a decision. It was an extremely constructive meeting, the Council were very well prepared and I'm pleased we have a result."



From Brimelow to Battistelli

The vote was the culmination of a process that began in May last year, when EPO president Alison Brimelow announced that she would not seek re-election for a second term.

Four candidates contested the election: Switzerland's Roland Grossenbacher – a former Admin Council chair and briefly a contender to be president six years ago; Susanne As Sivborg of Sweden – a former EPO examiner and in-house counsel at AstraZeneca who proved her popularity with patent users and practitioners by winning *Managing IP's* unofficial poll; Jesper Kongstad of Denmark and France's Benoît Battistelli.

Indeed, just three months later agreement looked so far off that Brimelow said she would be happy to extend her term by six months, if required, to ensure the EPO had a president at all.

France builds momentum

The story of the voting process, which took place over four meetings between October 2009 and March 2010, was essentially the story of Battistelli building support at the expense of the other leading contender, Grossenbacher.

Following the Admin Council's failure to elect a winner in October, Battistelli and Kongstad circulated a joint declaration in which they proposed Battistelli would be president for five years and Kongstad would chair the Council for three years. They also set out a joint manifesto covering the substantive issues of networking, the PCT, staffing, finance, cooperation and good governance.

The joint candidacy was firmly rejected by the Council. However, insiders say the substantive issues raised in the paper helped to build common ground, particularly as Battistelli and Kongstad had hitherto represented opposite positions on many issues.

"People have focused on the personal aspect of the declaration, which was rejected," said one Council member. "But another part of it was programmatic, setting out the programme that the EPO should follow if adopted by the Council."

Many of these substantive matters address issues that have long divided EPO member states, such as the degree of centralisation, the role of national offices and the exchange of information between them.

IP owners and practitioners react

Kim Finnilä, president of epi: "Benoît Battistelli is the best we can get at the moment."

Thierry Sueur, president of the BusinessEurope patent group and vice-president for IP at Air Liquide: "We would hope for a regular, direct and frank dialogue with the user

community on the general directions the Office is taking and, in advance, on specific projects which are likely to have serious consequences on the ability of applicants to obtain patents on true inventions they consider important."

John Brown, president of the Chartered Institute of Patent Attorneys in the UK:

"The appointment would appear to be not as political as we feared it would be. Mr Battistelli has a lot of experience in running a major national IP office and he knows exactly what he's let himself in for. He also has considerable exposure to business, which is a good thing."

The paper also commits to upholding IFRS as an accounting standard, something that France had long opposed and which is crucial to assessing the state of the EPO's finances.

December proved a decisive month in the process, with three developments that shaped the outcome.

First, separately from the EPO election, on December 4 EU ministers agreed a deal on an EU patent. The proposal, which still needs further discussion on issues such as languages, prompted dialogue about questions such as the EU/EPO relationship, the roles of the member states and the scope of an EU litigation system.

Second, the Council met again from December 8 to 11. At the beginning of that meeting, Grossenbacher still commanded the most support. However, by the end of it, momentum had switched noticeably to Battistelli – although he was still some way short of the 75% mark.

This shift was connected with Kongstad's decision to drop out of the race and resume his position as vice (and now acting) chair of the Council. Soon after, with the joint declaration having been disclosed by EPO staff, Denmark publicly supported Battistelli's candidacy.

When the Council representatives reconvened for a special meeting in February, Battistelli's position had improved again and he secured 26 votes in the final round of voting – just one short of the required number. The Council agreed to meet again for one day on March 1, with France optimistic that a decision was finally close.

Why did Battistelli win?

The counts in all the votes remain confidential, so it is impossible to be sure which member states backed which candidate – or why. And, as one Council member told *Managing IP*: "A lot of us are working under instructions from our governments. They can have many motivations for supporting one person rather than another."

Despite similarities in many of their policies, as representatives of different states, inevitably the candidates stood for slightly different priorities and world views. One such divergence concerned the relationship between the EPO and EU, which had been brought into focus by December's agreement on an EU patent.

At least one EPO member state argued that successfully implementing this agreement required the EPO to have a president from an EU country – which would rule out Grossenbacher.

Following the failure to get a result at the February meeting, the Norwegian delegation asked Grossenbacher and Sivborg to explain why their governments were maintaining their candidacies. It is believed both stressed that their governments were committed to their original positions, and that the 75% rule remained important in protecting the interests of minorities in the Council.

Managing IP understands that Grossenbacher also directly addressed the charge that his candidacy was weakened because Switzerland is not a member of the EU. In the context of the plans for the EU patent and unified litigation system, he emphasised that the rights of non-EU countries should be recognised and they should be treated equally.

We will probably never know how decisive this question was in the voting and other factors must also have played a role, including the French government's active campaign in support of its candidate.

Whatever the cause, by Monday afternoon's coffee break Battistelli had won the 27 votes necessary, and the Council members could fly out of Munich to their home countries satisfied that their job was done.

While the process had involved 20 votes and four meetings, they had delivered on their commitment to have a new president in place for July 1. And, just as importantly, they believe they have thrashed out many of the issues that had divided them before. "We are at a better point now than we were eight months ago," said one. "We have come closer together in the course of the campaign."

Battistelli sets out his plans

Benoît Battistelli's first task when he takes over the EPO's top job will be to hold discussions with the Office's employees, the president-elect has told *Managing IP*.

Speaking after the election, Battistelli said that he wanted to "build a relationship of confidence with them and their representatives".

It is unsurprising that he has prioritised industrial relations: just four years ago the Office lost more than 12,000 man-days to strikes against a series of proposed changes to the EPO's examiner reporting system says SUEPO, the union that represents EPO examiners. Cutting the Office's mounting backlog of applications will require the president-elect to keep the staff on-board.

Battistelli told *Managing IP* that another early task would be to look "very carefully" at the Office's financial situation.

The EPO is understood to be running a budget deficit once long-term pension liabilities are factored into its finances. It also faces falling revenues from renewals while the extent to which it can raise fees is restricted.

He also wants to ensure good communication with the Office's customers: "Don't forget that we aren't an organisation that works for itself but one that works for companies, academics and research centres, so I want to keep in close contact with users," he said.

Before March's election, some US IP commentators had questioned whether Battistelli backs patent prosecution highways – bilateral deals between IP offices to fast-track examination of patents.

Asked whether he was an enthusiastic supporter of PPHs, the president-elect said that his first priority is to improve the PCT system. But he added: "I am fully open to discussions to improving harmonisation in of rules and modalities at the international level. I want to develop good relations with other IP offices – whether that's the IP3 or IP5."

Battistelli was reluctant to discuss his plans for the EPO in detail, saying that the current president, Alison Brimelow, does not step down from the job until the end of June. But he set out his position on a number of topics during the campaign trail. In an interview published in the October issue of *Managing IP*, for example, Battistelli said that, if elected, his first task would be to launch two external, short-term (three-month long) audits on budgetary and financial trends and information systems.

The goal would be to question what he called the "artificial and dogmatic considerations" which he said had guided the EPO's approach to IFRS norms. The decision to apply IFRS accounting standards at the Office was taken when Roland Grossenbacher – Battistelli's closest rival for the EPO's top job – was chairman of the Administrative Council.

"The idea is hence to determine professionally and objectively what are the mid-term budgetary leeways in order to be able to offer the Council concrete policies that will allow for IT development/improvements and enhanced technical cooperation," Battistelli added.

On the question of the proper role of the EPO and national offices in Europe's patent system, Battistelli told *Managing IP* during the election that he envisaged a system of "virtual clusters" that would include examiners from the EPO and from member states' offices, competent in the same area of technology.

"I am open to a large debate without preconditions or taboos on legal, technical, financial and management issues within EPC guidelines and respecting the centralisation protocol which constitutes the framework of our organisation and which each member state has agreed to when joining. Up to now, we have tried to tackle this issue by sharing the workload. I suggest we network our respective competences."