

Travail de certification ACAD
Volker TIEMANN, General Counsel O-I Europe

Governance of the Board of Directors of a Swiss company integrated into an international Group

1. Context Personal

I joined the Group O-I in Switzerland in 2010. Since then, I am member of the European Management Team, and have been responsible (among others) for Legal, Compliance and Corporate Development/Strategy in Europe. I have been registered as Gérant of the Swiss Entity since 2010 and statutory Président since 2017.

In 2014 we experienced a Foreign-Corruption-Practices-Act-case in Poland with multinational complications, since we had to give notice to the SEC and go through the investigations with the US Department of Justice. It was my take-away in 2016 out of this case, that I have to review/reinforce the statutory compliance of our European Companies - in particular 2 entities: the Swiss s.a.r.l., being the European Principal including Leadership/Management of all operations - and the Dutch B.V., owning the shares not only even of all European entities.

As to the Swiss entity I searched for a pragmatic education and discovered ACAD. I was interested in balancing (i) my legal education in Germany (ii) my experiences in a German Law Firm and (iii) my experiences out of almost 15 years in the Bayer Group with the framework of Swiss Corporate Law - all, on a non-scientific, pragmatic base. During my first seminar I realized, that ACAD was exactly, what I was looking for, and I decided to work and benefit in parallel: The reshape of the Conseil d'Administration / Governance in CH on one hand and on the other hand the certification by ACAD at the same time.

2. Context Enterprise

O-I Group

O-I is the world's leading glass container manufacturer. O-I has more than a century of experience crafting pure, sustainable, brand-building glass packaging for many of the world's best-known food and beverage brands headquartered in the US and publicly listed at NYSE (with no mayor/controlling shareholder), characterized by the following key- numbers:

- Founded in 1903 as Owens Bottle Company
- Merged with Illinois Glass Company in 1929 to become Owens-Illinois, Inc.
- Worldwide headquarters: Perrysburg, Ohio, USA
- \$6.7 billion in net sales in 2016
- 79 plants in 23 countries
- Joint ventures in China, Italy, Malaysia, Mexico, the United States and Vietnam
- 27,000 employees worldwide
- More than 1,800 worldwide patents
- 49,000-plus customers in 86 countries
- 10,000-plus product offerings

O-I Europe

Below the Global Leadership organization by functions, O-I is primarily organized geographically: NAFTA, South America, Europe and APAC. There is no relevant flow of material between these regions - due to the logistic costs of empty glass containers, which does not allow to do cross-regional business. As a result, the regions are run as independent profit-centers with full P&L responsibilities and reported as such in the quarterly segment-reporting at the SEC and the Earnings-calls of the CEO.

Each region has its fully fletched regional Management Team (President, Finance, Strategy, Legal, Marketing, Operations, Supply Chain, HR) and full business responsibility - providing for the roll-out of global policies and strategic guidance given by the Corporate Center. Europe is the largest and most important region in the O-I group characterized by the following key-numbers:

- 2.2 billion Euro in net sales at EBIT margins between 11 - 13 %
- 35 Plants - 72 furnaces
- 8000 employees
- 18 billion glass containers per years / 6000 customers / 6000 product offerings
- 11 countries and 26 legal entities + 4 Joint Ventures in Italy and NL
- O-I Europe s.a.r.l. in Switzerland is the Principal Company of O-I in Europe (100 —120 employees leading the European operations – but no production

Historically, the Swiss center has been created in 2006 as a result of 3 mayor events in 2006:

- The acquisition of BSN by O-I – which created the largest glass container manufacturer in Europe
- The introduction of SAP
- The European Business Model providing for a centrally lead Business in CH

3. Statutory Challenges at O-I Europe s.a.r.l.

The changes in 2006 had been significant: a merger of 2 companies with 2 different cultures - the relocation of Management / Leadership into CH - the roll-out of SAP, which took almost 3 years - the centralization of processes (such as pricing, multinational accounts, supply chain, production metrics, capital expenditures) representing another significant change for an industry, which has operated primarily local before.

Additionally, the glass container industry is strategically characterized by (i) maturity with low growth margins and (ii) consistent cost optimization, efficiencies with heavy assets base to (iii) still produce regularly the consistent double digit cashflows, investor are expecting from O-I. This is the constant and ongoing challenge for such industry - most likely also for the next 50 years.

Within this - in principle quite constant - environment of a mature industry, the decade of change since 2006 created additional stress for the company - even more, when it comes to («usual») shutdowns (3 plants over the last 10 years) - in a not yet stable cultural environment of the merged company.

So, the focus of O-I Europe over the last decade was:

- stabilizing the transactional processes (SAP)
- building the central culture (merger + central Business Model)
- consistently optimizing costs and efficiencies

As a result, the statutory structure was of minor priority. O-I Europe s.a.r.l. was built legally upon minimum requirements / statutes - as suggested by a local notary in 2006, when no employee of O-I was present in CH.

A status-review in 2016 showed:

- conseil d'administration does not exist
- 8 gérants named (some at lower functional levels) - primarily to ensure signature of transactional processes
- one (artificial) annual meeting (without gérants present) with minimum requirements and minutes
- no meeting of gérants ever conducted
- company managed by operational Management Committee and global/regional Line-Management

4. Risk exposure O-I Europe s.a.r.l.

Risk exposure over the last 10 years has changed and become internationally more complex:

One example as already indicated: O-I had to report a Foreign-Corruption-Practices-Act-case in Poland to the SEC in the US. In this context, the corporate controls and set-up of the legal entity in CH, being the principal company of the activities in Poland, became relevant. We have been able to demonstrate our global policies and efforts to overcome the case, however, the somewhat light set-up in CH was not appreciated.

Another example is the extraterritorial application of German Criminal Law on Corruption: Until 1998 it was fully legal in Germany to book the cost for corruption in Mexico and deduct such costs for tax purposes. Following the reform of German Law such behavior is now criminal.

Extraterritorial application of Anti-Trust-Laws has been a reality already since decades (US since the thirties, Germany since the seventies, EU since late eighties). However, there is an increasing risk - resulting from the evolving needs to demonstrate the substance of appropriate Governance/Controls in each country - once a company is caught in such procedures. The Pricing in O-I is based on SAP-tools, centralized/cross-country throughout Europe and under the daily control and responsibility of the Swiss Management.

Further examples of increasing risks are resulting from the transparency in the fiscal world. The Bank, who is administrating the Global Stock Option program in O-I, offers an Application, which shows the presence of any Manager in O-I in any country in a given year deriving from the use of his Business Mobile/Laptop/Tablet - by one simple click. This knowledge is not yet automatically transferred to Tax Authorities and it may never become accessible for Authorities - subject to the development of General Data Protection Laws. Also, as such, it is primarily a risk of the individual Manager. Still, in case of an important role of a certain Manager in a certain Business Model, the company may have to demonstrate, that it used at least appropriate governance to provide for controls, training, education, communication to such Managers.

In terms of Environmental, Health, Safety (EHS) we have had incidents in Italy, a country which is particularly challenging in terms of governance and standards for Top-Management in EHS - with a risk to be applied extraterritorial.

In ACAD I learned, that (i) individual legal liabilities for Members of an Advisory Board in CH in terms of international comparison are still more limited, even though evolving and (ii) legal liabilities/jurisprudence for Companies due to lack of Governance are also still limited. In relative terms this reduces the assessment of risk exposure in CH. For example the personal liability in case of bankruptcy and/or non-payment of social and fiscal contributions is not a risk (in real life) at O-I.

So, my conclusion about risk assessment was less about deficits under Swiss Corporate Laws and Standards itself, but more about the transfer and the introduction of such deficits into litigations at another forum outside of Switzerland (in particular US, UK or Italy). It helps, that O-I had a Compliance System in place on a Global basis, which was judged appropriate and honest - even by the US-DoJ - and which is applied across all entities. Nonetheless, I identified a need to demonstrate also an active Governance at the leading European Entity of O-I in Switzerland.

The challenge for me was not to re-invent the wheel. But, I was interested to match both primary tasks of Governance (i) Business Strategy and (ii) Risk/Compliance-Management into an active Governance (with 2 Meetings per year) at a sub-ordinated Swiss Entity in accordance with Swiss Law/Standards:

Governance in Compliance

To create acceptance of the Compliance aspects of Governance, I try to focus on 1 risk only per Meeting with priority on the following 3 mayor risks for O-I.: Anti-Trust, EHS, Taxation.

Governance in Business

To create acceptance of the Business aspects of Governance (Strategy, Budget, Capital allocation Organization ...) I try to respect the continuous cycle of such processes in the Global Matrix and produce the 2 Swiss Meetings at the right time with the right people to allow a respected opinion, which is followed up in other Meetings. The results are communicated back and forth in the never-ending story of Strategy, and we have to pro-actively communicate, that we accept over-ruling decisions in other bodies of the group.

5. Corrective Actions

Integration into Global Governance

The connection of dots between Global Policies and Corporate set-up in CH has been provided for at the initial Meeting:

- presenting Fundamentals in CH to new Board Members in the first Meeting in July
- aligning/reminding in O-I Europe s.a.r.l. the new Board-Members about Compliance system and procedures as set-out on Global Homepage (plus Trainings, E-Learnings, Controls, Hotline ...).
- Introduction of principle: focus on one or two priorities per Board-Meeting in Meetings to come, which allows to discuss those one or two topics in more depth and align efficiently with topics/procedures resulting from existing cross-statutory-matrix in Global O-I:

Examples from July-Meeting Swiss Board

- Organization: The most important topic (in terms of substance) at the first Meeting has been the complex discussion around the future Business Model, which is by nature multi-functional and -hierarchical and -geographical. We invited our Tax-experts to the Board Meeting in July and developed an interim direction in our Board-Meeting. It was followed up by an ad-hoc-Senior-Management-Meeting at Global level (with CEO-participating). The project continued over months with an almost final decision at our December - Meeting in CH-Board - followed by a final Approval Meeting at global level (again with CEO-participating).

Examples from December-Meeting Swiss Board

- Strategy: there is an annual strategic wheel in place at O-I resulting into 3 year-plans to be presented to the Board at ultimate parent level in US at end of each year - it means we are not doing an independent strategic process in CH at s.a.r.l., but we use our Meeting in December, in which the European President comments his Pros/Cons on the existing status of the plan prior US-Board-Meeting - thereby also lobbying for changes (with the US-member in our Board in CH)
- Capital allocation: complex global process - subject to certain buckets and potential urgencies and Budget 2018: both processes under functional control of Global Finance - it means we use our CFO in our Swiss Board in December to present status to allow discussion (primarily for our European President, which may result into changes of final global budgets in January).
- Safety: in terms of Risk-Compliance-Management we focused in December-Meeting on Safety only - as presented by the Safety Director Europe. We

approved the newly introduced Safety Talks at all Management-Meetings and recommended to introduce focus plants and focus areas into the Global Policy and action items of the EHS-function.

« technical » statutory steps taken

- new règlement d'organisation
 - distinction between Surveillance and Management
 - 2 regular Meetings p.a.
 - mid-year meeting and end-year meeting
 - guidance for standardized agendas of 2 Meetings
 - introduction of new COMs-tools
 - telepresence,
 - Skype
 - efficient minutes

- composition of Board-members of O-I Europe s.a.r.l. (4 Members)
 - geographical coverage
 - 1xUS,
 - 3xEuropeans (France, CH, Italy)
 - functional coverage
 - Management,
 - Finance,
 - Legal,
 - Strategy
 - hierarchical coverage
 - Global Leadership,
 - Regional Leadership,
 - Operational Leadership,
 - Administrative Leadership
 - diversity
 - 1 woman,
 - 3 men
 - team-spirit / fit

- corporate registration
 - including new double signatures

- agenda / minutes
 - as attached hereto

6. Lessons learned / Résumé

The overall timeframe for this work has been 9 months from Q4/2017 until Q2/2018. It is up and running now since mid 2017.

Maybe, it could have been done in 2 weeks. However, I was interested in a smooth transition to introduce the new corporate needs and to get buy-in for Meetings to come.

For the first aspect of Business Governance/Strategy it is necessary for the Board of a sub-ordinated entity in a multinational Group to know, how Global Corporate Procedures are working (in terms of calendar and people) to avoid unnecessary or even counterproductive work. If Timing is right, the Meetings at Swiss level can be very instrumental for Global Meetings and allow fruitful discussion back and forth on iterative topics in multinational companies (e.g. strategy ...). Usually, a sequence of 4 - 6 Meetings per annum is necessary for a Surveillance Body at ultimate parent level. I think, at sub-ordinated level, the 2 Meetings at our Swiss level are helpful and sufficient, if aligned to such global procedures. The integration of a sub-ordinated Board into Business Governance and Strategy makes sense, if it represents an important piece of the Business (here: Europe in O-I). Probably, at lower levels in statutory structure, the active Business Governance of legal entities can be more limited to formal requirements only - financial statements, year-end results, dividends, auditors – again always subject to importance of legal entity in a given group.

The second aspect for an active effective Governance of a Board of a sub-ordinated Swiss entity in a multi-national entity is Risk-Management / Compliance. Again and even here, I believe, the Board needs to be integrated into the global Matrix to produce acceptance and efficiency of his Surveillance. The focus on 1 topic per Meeting seems to me again a good advice to drive durable acceptance and produce substance.

Please, forgive me, to allow me adding finally one comment, which - of course - I liked very much: My President told me after our December Meeting: "This was a real Board - just better than usually in US".

Volker Tiemann, Vufflens, 16.1.2017

Attachments

For further illustration of the 9 months-activities around the set-up of the new Board of the Swiss company in the context of an international Group here is the list of attachments:

- extrait du registre
- règlement d'organisation
- slide deck première séance
- PV de la première séance au mois de juin 2017
- PV de la deuxième séance au mois de décembre 2017
- Lessons learned (version anglaise)