

The *Akzo Nobel* Decision: A Warning to the Unwary

If you have any questions, please contact the following, or your Vorys relationship attorney:

James A. Wilson
jawilson@vorys.com
614.464.5606

The recent decision of the European Court of Justice in *Akzo Nobel* is an important reminder of the perils of assuming that jurisdictions outside the United States give the same status to in-house counsel as our own courts. In that case, the Court of Justice (the European Union's highest court) unanimously reaffirmed that communications between in-house counsel and company executives are not privileged, and therefore upheld the seizure of notes from such communications in an investigation into whether Akzo Nobel and others had violated European competition law.

While the decision does not make new law in Europe, a number of organizations, including the American Corporate Counsel Association, had urged Europe's highest court to reconsider the rule that an employment relationship between in-house counsel and the corporation undercuts counsel's duty of independent judgment, and thus was an insurmountable barrier to the creation of a privileged relationship. The Court refused, finding that no privilege can exist if the attorney has an employment relationship with a company, even if that attorney is a member of the bar or national law society. In doing so, it left in place a rule that adds to the complexity of doing business in Europe.

For in-house counsel whose companies have European operations or employees, the decision is a signal to caution in any communication of legal advice to employees in Europe. As a practical matter, the decision means that in-house counsel must assume that any communication with employees located in Europe – even if made from within the United States – is likely not to be protected by privilege. Moreover, it is not difficult to imagine that lawyers in the United States may soon be arguing that advice that would be privileged under U.S. law loses its privilege if communicated to a European executive.

More broadly, the decision is a reminder that in dealing with any operation outside the United States, it is dangerous to assume that the attorney-client privilege will be honored in the same way that it is in the United States. Like the European Union, jurisdictions such as Japan and China have different views as to the role of in-house counsel. Moreover, even outside counsel's communications may be found to be outside the attorney-client privilege if they purport to give advice regarding the laws of a jurisdiction in which the attorney is not licensed. Careful consideration of each jurisdiction's rules regarding privilege is thus more essential than ever when doing business outside of the United States.

This client alert is for general information purposes and should not be regarded as legal advice.