

## Creditor protection in cross-border mergers; unfinished business

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### Abstract

In cross-border mergers, creditor protection is important to facilitate a smooth, efficient and transparent process necessary to facilitate the single market. As all assets and liabilities are being transferred and there is a risk that the liabilities of the acquiring company will exceed the assets, creditor protection needs to be safeguarded in legal mergers. As the title suggests, creditor protection in the context of cross-border mergers and the recently adopted directive is examined in this paper, as well as the position of creditors under Dutch law and the Third Directive. The ex-ante and ex-post systems of creditor protection, both existing in the Member States of the EU, and which are both supported by strong arguments, are also discussed. The fact that differences in creditor protection rules nevertheless remain may create unjustifiable differences in the position of various groups of creditors involved in one single cross-border merger. The authors conclude that the case for leaving creditor protection to the Member States is weakening. Differences in national legislation on creditor protection, defensible as they may be, are ultimately of a technical nature and create unnecessary and unjustifiable impediments. There are strong arguments, in other words, to adopt the same provisions for all transactions for the sake of simplicity, but while this may be attractive, it can lead to undesired delay. Amending the Directive at this point in time thus seems equally unfeasible. This stresses the need to make haste with at least some further harmonization of creditor protection rules related to the Third Directive.

### Keywords

creditor protection; cross-border mergers; tenth directive; third directive; EU company law

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