Title: Sui generis database rights - The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2018 **IA No:** BEISIPO020 **RPC Reference No: RPC-4295(1)-BEIS** **Lead department or agency:** IPO **Other departments or agencies:**	**Impact Assessment (IA)** **Date:** 17/10/2018 **Stage:** Final **Source of intervention:** Domestic **Type of measure:** Secondary legislation **Contact for enquiries:** david.burns@ipo.gov.uk

Summary: Intervention and Options

RPC Opinion: GREEN

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANDCB in 2014 prices)	**One-In, Three-Out**	**Business Impact Target Status**
N/A	N/A	N/A	Not in scope	Non qualifying provision

What is the problem under consideration? Why is government intervention necessary?

Sui generis database rights are a unique construction of the EU that protect investments in databases by preventing the unauthorised use of or extraction of data from a database without the permission of the database creator. The database right is provided within the EU and EEA on a cross-border, reciprocal basis and does not extend to non-Member States. Therefore, in a 'No Deal' scenario, reciprocal protection will cease between the EEA and UK. Amendment of UK law will be necessary in this situation to ensure that UK citizens and residents continue to receive the right in the UK.

What are the policy objectives and the intended effects?

If no agreement is reached between the UK and EU on the continued mutual recognition of database rights, our aim is to appropriately balance the needs of database creators and database consumers in the UK. The chosen policy should:

- Provide continuity and certainty to those in the UK that create or use databases;
- Protect the investments in databases of UK creators so as to encourage innovation; and
- Ensure a level playing field for UK database producers and users with the EU.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0.1: Status quo (current arrangements). The UK provides the database right to all EEA creators.
Option 0.2: Do nothing (after the UK withdraws from the EU). No changes are made to UK law, which continues to protect EEA databases only ("EEA" will no longer include UK).
Option 1: Provide new sui generis rights to UK databases only after exit and cease to protect new EEA databases. Sui generis rights acquired in the UK prior to exit for EEA (incl. UK) databases are maintained.
Option 2: Do not provide any protection for new UK or EEA databases after leaving the EU. UK law is amended to remove the provision for new sui generis rights entirely.
The preferred option is option 1. While the benefits and costs of the right in encouraging innovation in or stifling access to databases are not currently well-quantified, this option provides the greatest continuity and clarity for UK stakeholders.

Will the policy be reviewed? It will not be reviewed. **If applicable, set review date:** Month/Year

Does implementation go beyond minimum EU requirements?		N/A		
Are any of these organisations in scope?	**Micro** Yes	**Small** Yes	**Medium** Yes	**Large** Yes
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)		**Traded:** N/A	**Non-traded:** N/A	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister: Chris Skidmore Date: 12/12/18

Summary: Analysis & Evidence

Policy Option 1

Description: In a no-deal scenario, provide domestic protection for UK database creators and cease protection for new EEA databases.

FULL ECONOMIC ASSESSMENT

Price Base Year 2018	PV Base Year 2018	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	**High:** N/A	**Best Estimate:** N/A

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	1	N/A	**N/A**
High	N/A		N/A	**N/A**
Best Estimate	N/A		N/A	**N/A**

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs due to a lack of available data. However, it is expected that costs to UK database creators will be minimal. If EEA database creators introduce new licensing practices in the face of the loss of UK sui generis rights, UK database consumers may face familiarisation costs. These costs may not be trivial if EEA creators apply disparate approaches to licensing, but it is not possible to estimate potential future behaviour of EEA creators.

Other key non-monetised costs by 'main affected groups'

This option maintains the UK status quo for UK database creators so should not introduce any costs to those right holders. The primary costs will be to EEA database creators, who will not qualify for the right in the UK; the impact of this will depend on to what extent EEA creators can instead rely on copyright and other forms of protection (though impacts on EEA creators are beyond the scope of this IA). The change will likely result in familiarisation costs for UK consumers of EEA databases.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	1	N/A	**N/A**
High	N/A		N/A	**N/A**
Best Estimate	N/A		N/A	**N/A**

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits of this option due to a lack of available data. However, as this option maintains the current situation insofar as UK database producers will continue to receive the same level of protection in the UK, the benefits are expected to be close to zero.

Other key non-monetised benefits by 'main affected groups'

This option maintains the status quo in the UK for UK database creators (e.g. mapping firms, the software sector, price comparison sites, stock exchanges) and the UK consumers of those databases, providing continuity and certainty to the status of database protection in the UK. It also ensures that the UK database industry operates on a level playing field with that of the EU, with databases produced domestically receiving protection.

Key assumptions/sensitivities/risks — **Discount rate** 3.5%

It is assumed that acquired sui generis database rights (i.e. protection in the EEA and UK for databases produced prior to exit) will continue to exist even after the UK leaves the EU/EEA. Impacts associated with a loss of protection for existing databases therefore have not been assessed.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: N/A	**Benefits:** N/A	**Net:** N/A	N/A

Summary: Analysis & Evidence

Policy Option 2

Description: In a no-deal scenario, cease to provide the sui generis right in the UK for new databases after exit.

FULL ECONOMIC ASSESSMENT

Price Base Year 2018	PV Base Year 2018	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	**High:** N/A	**Best Estimate:** N/A

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	1	N/A	**N/A**
High	N/A		N/A	**N/A**
Best Estimate	N/A		N/A	**N/A**

Description and scale of key monetised costs by 'main affected groups'

UK creators would no longer receive the database right, which may weaken their ability to commercially exploit (e.g. license) their databases. It is not possible to monetise the costs of this option due to a lack of available data (including on the extent that the right is relied on over other forms of protection, such as contracts), but investments in databases in the UK can be significant (Ordnance Survey invested £25 million in one database in 2016). Costs may therefore also be significant.

Other key non-monetised costs by 'main affected groups'

The ability of UK database creators to commercially exploit their databases would be reduced (e.g. competitors may be able to use their databases and creators may lose licensing fees). In turn, this could weaken database innovation in the UK (particularly with respect to the EU). There are likely to be (potentially significant) familiarisation costs for UK creators and users in moving to alternative means of protection - e.g. relying more heavily on copyright or amending licences.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	1	N/A	**N/A**
High	N/A		N/A	**N/A**
Best Estimate	N/A		N/A	**N/A**

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits of this option due to a lack of available data (further information is provided below).

Other key non-monetised benefits by 'main affected groups'

Ceasing the sui generis right may benefit industries reliant on access to data if the existing right stifles innovation (e.g. by producing monopolies on information); however, evidence supporting this view is limited - the European Commission evaluation suggests that sui generis rights do not affect free competition. Furthermore, any benefit to users may be limited by creators utilising other forms of protection (e.g. copyright or restrictive licensing agreements), which may be of unclear scope.

Key assumptions/sensitivities/risks — **Discount rate** 3.5%

It is assumed that acquired sui generis database rights (i.e. protection in the EEA and UK for databases produced prior to exit) will continue to exist even after the UK leaves the EU/EEA. Impacts associated with a loss of protection for existing databases therefore have not been assessed.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m: N/A
Costs: N/A	**Benefits:** N/A	**Net:** N/A	

Evidence Base (for summary sheets)

Sui generis database rights are a unique construction of the EU that protect investments in databases by preventing the use of or extraction of data from a database without the permission of its creator. The sui generis right protects any database whose creation involved a significant investment of time, money, or effort and exists alongside copyright protection for databases, which, by contrast, extends only to any 'original' elements of a database – such as the choice of data and the arrangement thereof. It was, in part, because of this limited scope of copyright protection for databases that the sui generis right was introduced by the EU Database Directive[1] ("the Directive") in 1996 with the aim of stimulating database production in the EU while providing legal clarity to users and creators of databases.

The Directive had two components: first, it harmonised across the EU the level of copyright protection for databases; and, second, introduced the sui generis database right. Prior to the Directive, the standard of originality required of a database to qualify for copyright protection varied across the EU – some Member States applied a strict threshold for creativity that meant only truly 'original' databases were protected under copyright, while other states applied a broader interpretation. In the UK, for example, case law had set a 'sweat of the brow' standard for copyright protection of databases, in which significant diligence and labour of the database creator was considered sufficient for a database to qualify for copyright.

The Directive mandates that Member States provide the sui generis right to citizens, residents, and businesses of EU Member States; this has since been extended across all EEA states[2]. Databases produced by those in or from the EEA are therefore protected anywhere in the EEA. Unlike other forms of intellectual property – such as copyright – the sui generis right is not provided for by wider international treaties or agreements. Therefore, the protection does not extend to non-Member States.

In the UK, the Directive was transposed into law by the Copyright and Rights in Databases Regulations 1997[3] ("the Regulations"). This amended the Copyright, Designs and Patents Act 1988 to make it explicit that copyright protection is provided only to original databases, and introduced the sui generis right. Regulation 18 of the Regulations specifies that the sui generis right is available only for nationals, residents, and businesses of the EEA.

The impacts of the Directive are, in principle, wide-ranging. Databases may be used or created by virtually anyone. Groups that may use databases frequently include academics and other researchers, businesses, governments, libraries, and schools. The effect of the right on database consumers such as these is ambiguous. While increased incentives to create databases should positively affect consumers through increased choice, their access to and use of those databases is restricted and may require the payment of licencing fees.

From our initial stakeholder engagement and literature review, it was found that database rights are held by mapping firms (such as Ordnance Survey), the software sector, price comparison sites, London Stock Exchange, other exchanges (those based overseas but developing databases in the UK), trading products based on database rights, sports fixtures services and benchmarking services. These right holders should benefit from the increased scope of protection across the EU, which enables them to commercialise and market their databases or prevent competitors exploiting their work. However, the scope of sui generis rights often overlaps with that provided by other forms of protection, such as copyright, licensing agreements, and confidentiality, which firms have indicated that they can use to protect their databases.

There is little quantitative information on how stakeholders are affected by the Directive. The most comprehensive assessments of its impact are two European Commission (EC) evaluations undertaken in 2005[4] and 2018[5] respectively. The results of these two evaluations, each of which involved a public consultation across all Member States, are largely similar. It was found that the Database Directive has effectively harmonised the level of protection for databases across the EU and provided legal clarity, both for copyright and the sui generis database right. Responses to the EC consultations suggested that, in line with the above, right holders valued the right for the extended scope of protection and its legal

[1] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

[2] Point 9a, Annex XVII to the EEA Agreement

[3] SI 1997/3032

[4] First evaluation of Directive 96/9/EC on the legal protection of databases, http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf

[5] Evaluation of Directive 96/9/EC on the legal protection of databases

clarity, though database users – particularly those in academia and research – felt that the Directive did not fairly balance their interests with those of right holders.

The EC evaluations found that the effectiveness of the sui generis right in its aim of stimulating database production in the EU and making the EU database industry more globally competitive was unproven. While database production had, according to the Gale Directory of Databases (GDD), increased since the Directive was introduced[6], it is not known to what extent this was influenced by the sui generis right. Furthermore, the EU share of global database production has fluctuated since the right was introduced and, as of 2013, was below what it had been when the Directive was introduced[7]; again, however, it is difficult to know whether any changes are because of, or have been mitigated by, the right. In addition, the GDD does not capture all databases (alternative evidence on the number of databases was sought for the 2018 EC evaluation but the GDD remained the most comprehensive data available). Given the legal clarity the sui generis database right provides and the lack of evidence against it, the EC evaluation supported maintaining the status quo in protection for databases.

It is unknown how many databases are protected by the right in the UK as databases do not need to be registered to qualify and the GDD data is not separated by country. There is believed to be significant investment in databases by UK businesses; the geospatial database management system owned by Ordnance Survey, for example, was worth £25 million in 2016[8].

What happens when the UK leaves the EU/EEA?

The sui generis database right is unique to the EEA and is provided only to citizens, residents, and businesses of Member States. Therefore, on leaving the EU and EEA, and in the absence of a negotiated agreement to the contrary, those in or from the UK will cease to receive protection in the EEA for new databases. In such a situation, the UK will also no longer be obliged to provide the database right for those in or from the EEA for new databases. UK law currently provides the right to citizens, residents, and businesses of the EEA. Post-exit, this will not include the UK – i.e. without amendment to UK law after exit, sui generis rights would be provided in the UK to EEA nationals, residents, and businesses, but not UK nationals, residents, and businesses. Amendment of UK law will be necessary to ensure that the right continues to be provided in the UK to those in or from the UK and to ensure a level playing field between UK and EU/EEA database creators.

This impact assessment considers the potential contingency changes to be made to UK law in the event that the UK leaves the EU without an agreement on sui generis database rights.

Rationale for intervention

The Government is seeking to correct problems in UK legislation that will arise as a result of the UK's withdrawal from the EU. This will ensure the UK's regulatory framework functions in all scenarios. In line with this general aim, action is necessary after the UK leaves the EU to ensure that our law on the sui generis database rights continues to work as intended and benefits those in the UK.

Objectives

In the absence of an agreement on reciprocal database protection between the UK and the EU, the Government aims to appropriately balance the needs of database creators and consumers in the UK. The chosen policy should:

- Provide continuity and certainty to creators and users of UK databases.
- Protect the investments in databases of UK creators so as to encourage innovation in databases; and
- To ensure a level playing field for UK database producers and users with the EU.

Description of options considered (including status-quo)

The policy options in the scenario in which no agreement is reached with the EU on database rights are as follows:

[6] See Fig. 2 of Evaluation of Directive 96/9/EC on the legal protection of databases, which is adapted from the Gale Directory of Databases 30th to 36th edition. This data is not necessarily accurate, though, as not all databases are registered with the Directory and multiple databases can be lodged under a single title.

[7] Fig. 4 of Evaluation of Directive 96/9/EC on the legal protection of databases.

[8] OS Annual Accounts: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/636813/ordnance-survey-annual-report-2016-2017-web.pdf

- Option 0.1: Status quo (current arrangements). Currently, the UK provides the sui generis database right to databases created by EEA citizens, residents, and businesses.
- Option 0.2: Do nothing – no changes would be made to UK law. This would result in the UK providing the sui generis right to those in or from the EEA, which will not include the UK.
- Option 1: Provide the sui generis right to new UK databases only after exit and cease to protect new EEA databases. UK law would be amended to substitute references to the EEA with references to the UK, the substance of the right otherwise being maintained. (This option applies only in the event that the UK leaves the EU without an agreement.)
- Option 2: Do not provide any protection for new databases from the UK or EEA after leaving the EU. UK law would be amended to remove the provision of sui generis rights entirely for new databases. (This option applies only in the event that the UK leaves the EU without an agreement.)

Potential changes to the sui generis right (e.g. different threshold for or term of protection) have not been explored in significant detail, and it is not believed that such changes would be within the scope of the powers set out in the EU (Withdrawal) Act 2018[9]. Therefore, these options have not been considered as an option at this stage. Further assessments of the database right may be made and changes to its scope proposed at a later date, particularly if further analytical information becomes available.

In all options, it is assumed that acquired database rights – that is, database rights acquired in the EEA (including the UK) prior to the UK leaving the EEA – continue to exist in both the EEA and the UK post-exit.

Costs and benefits of the options considered

The policy options in the following are considered for the scenario in which no agreement is reached with the EU on continued recognition of the sui generis database right between the EU and UK. In this event, EEA Member States will be under no obligation to protect databases produced by those in the UK post-exit. It is considered likely that Member States will therefore cease to offer this protection. The loss of this protection will negatively impact database creators in the UK, whose ability to commercialise their databases in the EEA or to prevent EEA-based competitors exploiting their databases will be weakened. UK-based database creators wishing to protect their databases in the EEA will need to rely on other forms of protection, such as copyright (the scope of which may be narrower and less clear) or restrictive licensing agreements and there may be familiarisation costs associated with this. However, these costs to UK database creators do not arise as a result of the domestic policy changes outlined below, nor can they be mitigated by unilateral policy changes in the UK; rather, the EEA-based costs to UK database creators arise as a result of the UK and EU not providing mutual recognition of sui generis database rights and will occur alongside the costs and benefits of each policy option considered in this Impact Assessment.

Option 0.1: Status quo (current arrangements)

As discussed above, databases created by citizens, residents, and businesses of the EEA, the making of which involved a substantial investment of time or financial resources, are protected in the UK under the Copyright and Rights in Databases Regulations 1997 for a period of fifteen years from their creation. (Conversely, databases created by UK citizens, residents, and businesses are protected in EEA Member States under equivalent terms under those states' implementations of the Database Directive; this does not depend on domestic policy in the UK.)

This represents the baseline against which the following options are considered.

Option 0.2: Do nothing.

Under this proposal, no changes would be made to existing UK law after the UK leaves the EU. Regulation 18 of the Regulations, which specifies that the database right is provided to citizens, residents, and businesses of the EEA, would remain. Once the UK leaves the EEA, this would result in UK database creators not receiving database protection in the UK, while EEA database creators would continue to receive this right in the UK.

Benefits

[9] European Union (Withdrawal) Act 2018

Database consumers in the UK could gain increased access, and potentially at a cheaper cost, to databases produced by creators in the UK. If the pre-exit status quo stifles innovation in, for example, academia and research, due to overly restrictive access to databases, removing the right for UK creators would mitigate this and could promote growth in industries reliant on access to databases. However, there is limited evidence to support this view of the sui generis right; the 2005 and 2018 EC evaluations provide the most substantial evidence regarding the right and both concluded that there is no evidence that the sui generis database right stifles innovation. Moreover, access to databases could continue to be restricted on copyright and contractual grounds, so it is not clear to what extent this change would benefit UK consumers, if at all.

Costs

The primary disadvantage to option 0.2 arises from the disadvantage UK database creators would find themselves in if the UK provided the sui generis right to EEA database creators but not to UK database creators. As at present, UK consumers will not be able to use or extract data from qualifying databases created by those in the EEA but, as discussed above, this will be without any of the reciprocal benefits for UK right holders that are in place prior to exit. This would effectively place UK database industries at a competitive disadvantage to their EEA counterparts: EEA databases would receive protection in the EEA and UK (while UK databases would not be protected in either territory), and EEA consumers would not be restricted from using UK databases (while UK consumers would be restricted from using EEA databases).

Under this option, the ability of UK database creators to commercialise and prevent competitors using their databases in the UK would be weakened as they would have to rely on alternative forms of protection, which may provide less legal clarity or a narrower scope of protection. This change may result in a loss of licensing fees for UK database creators and may dis-incentivise the production of databases in the UK – which would lead to less choice in databases for consumers. The extent of this cost is unclear. While some database creators do, according to responses to the 2018 EC evaluation, already make use of other means of database protection (in particular, contractual agreements), removing the sui generis right would compel all right holders to move to alternative protection for their databases. This would disproportionately impact SMEs, for whom the costs in introducing new practices may be significant.

This change would also introduce familiarisation costs to UK users of databases, such as researchers and the academic community, as they may face changes to their ability to access UK-produced databases; these costs may be significant if database creators take disparate approaches in protecting their databases in the absence of the sui generis right. As for creators, these costs would disproportionately burden SMEs that rely on access to databases. Because these costs depend on how UK database creators would react to the loss of the sui generis right, it is not possible to estimate the extent of the costs.

Taking no action after the UK leaves the EU appears to provide little or no conclusive benefit to those in the UK – either database creators or consumers. What is more, this option provides unreciprocated rights to EEA citizens, residents, and businesses and does so at the exclusion of those in the UK. This policy option may place UK industries that use or create databases at a disadvantage relative to their EEA counterparts, who would receive greater protection in the UK than UK creators. This would provide minimal, if any, benefit to those in the UK. Any costs associated with this option would also more heavily impact on SMEs, who are less likely to be in the position to absorb the costs. Option 0.2 is, therefore, ruled out.

Option 1: Provide domestic database protection for UK database creators and cease protection for EEA creators.

Proposed changes

Regulation 18 of the Regulations would be amended to substitute references to the EEA or EEA states with references to the UK. Other than this qualifying criterion, the remainder of the Regulations would be maintained, such that the scope of protection for new databases is unchanged.

Benefits

This option maintains the pre-exit status quo, as far as is possible, for UK database creators and consumers in the UK, who are already familiar with the sui generis database right. Databases produced in the UK post-exit will continue to receive the same level of protection in the UK, providing certainty and continuity, both to creators and to the users of their databases (which database creators indicated, in the

consultation supporting the 2018 EC evaluation, that they valued). Maintaining the status quo will be of particular benefit to SMEs, who may find it more costly to adapt to changes in the law.

Under this option, databases produced after the UK leaves the EU by those in or from the EEA will not be protected in the UK. This could open up access for database users in the UK (e.g. the academic community) to databases produced in the EEA, which, prior to exit, is restricted and will be beneficial to those whose work relies on access to data. However, it may be that EEA-based database creators restrict access to their databases in other ways – e.g., through relying more heavily on copyright protection or in closing access to their databases except under restrictive licences – that limit the benefit of this change to database users in the UK. Therefore, it is not known to what extent database users in the UK will benefit by database rights no longer being offered to EEA creators, if at all.

This change will therefore ensure that the UK database rights regime reflects the EU's: domestic databases would receive sui generis rights, while 'third country' databases would not. This should avoid UK industries that create or rely on databases being disadvantaged relative to their EU counterparts, which would otherwise be the case in option 0.2 (taking no action after exit).

Costs

The costs arising as a result of this policy option are minimal. The primary affected party will be EEA database creators, whose ability to commercialise their works in the UK will be weakened.

There is a risk of an indirect cost to UK persons or businesses that currently buy (or buy exclusive licences to) and exploit the database rights to databases produced elsewhere in the EEA. For example, under existing arrangements, a database created in another EEA state (e.g., Ireland) is protected in the UK. A UK business can buy the rights to the database from the creator and commercialise the database in the UK and the rest of the EEA. Under this option, after the UK leaves the EU, databases produced by EEA creators will not be protected in the UK. Therefore, a UK business would be precluded from exploiting the database rights of an EEA database in the UK because those rights would not exist in the UK. This is not expected to result in significant, if any, costs: we are not aware of any UK businesses that currently engage in this practice of commercial exploitation of databases produced elsewhere in the EEA; even where this is the case, those businesses could still be able to do so where and to the extent that those databases are protected by copyright or by contractual agreements.

The change may give rise to some familiarisation costs for UK consumers of EEA databases if the creators of those databases introduce new licensing practices with which UK consumers would need to familiarise themselves. These familiarisation costs may not be trivial if EEA database creators use bespoke licensing arrangements, rather than applying a more homogeneous approach. This is not possible to estimate however, as we would need to know the potential future behaviour of EEA database creators.

Option 2: Cease to provide the sui generis right in the UK for new databases after exit

This option proposes removing the UK sui generis database right entirely for all databases produced after the UK leaves the EU. In practice, this would involve amending the Regulations to delete Part III, which provides the right. Databases could still attract protection in the UK under copyright, but only on the condition that, and only to the extent to which, they are original. This option only considers making changes to the sui generis database right and would not involve making subsequent changes to the standard for copyright protection of databases, which is set out in the Copyright, Designs and Patents Act 1988 as amended by Part II of the Regulations.

Benefits

Removing the database right would be beneficial for industries that rely on access to data if the current database right over-protects databases to the point of stifling innovation (e.g., the existing scope of protection may lead to monopolies on information, which could increase prices). This could be more beneficial to SMEs as data more readily available may encourage database creation by SMEs. The EC evaluations of the Database Directive suggest that the evidence supporting this conclusion is limited and that the sui generis right does not interfere with free competition in any significant way[10]. However, the issue likely requires further assessment, with responses from the EC's consultation in support of the evaluation indicating that the sui generis right is not widely used as a licensing tool - rather than playing a strong investment incentive role, the sui generis right is mostly seen as an ex-post legal instrument

[10] EC evaluation, page 12

when parties disagree, notably in litigation. What is more, although consumers would ostensibly gain improved access to databases, this may be moderated by changes in practice by database creators (e.g. implementing restrictive licensing agreements) and a possible lack of clarity over which databases are protected by copyright (and which elements of those databases are protected under copyright).

Costs

By removing the sui generis database right in the UK entirely, any incremental benefits achieved by the current law will be lost. The ability of database creators – in the UK or EEA – to commercialise and prevent competitors using their databases in the UK would be reduced as they would have to rely on alternative forms of protection, which may provide less legal clarity or a narrower scope of protection. This change may result in a loss of licensing fees for UK database creators and may dis-incentivise the production of databases in the UK – which would lead to less choice in databases for consumers. From the EC evaluations, in particular the 2018 evaluation, the public consultation indicated that the most significant benefits is the certainty about the legality of using databases and the certainty as to the identification of the owner.

Contracts can be used to protect databases in the absence of any database directive and this was highlighted as a method used in the 2018 EC evaluation. However, relying more heavily on contractual agreements may disproportionately impact SMEs, for whom the costs in introducing new practices may be significant.

At the present time, there is not sufficient evidence to support this policy option. It is also possible that this change would not fall within the scope of the powers conferred by the EU (Withdrawal) Act. Therefore, option 2 is ruled out. Removing the sui generis database right may be re-considered at a later time should evidence justifying that decision become available.

Risks and assumptions

The assessments in this Impact Assessment are made on the assumption that acquired database rights – that is, database rights acquired in the EEA (including the UK) prior to the UK leaving the EU – continue to exist in both the EEA and the UK after the UK withdraws from the EU.

Option 2 has been assessed under the assumption that withdrawing the sui generis database right would not necessarily involve concurrent changes to the standard of originality required for copyright protection of databases set out in the Copyright and Rights in Databases Regulations 1997.

There is limited evidence on both the costs and benefits of the sui generis right, and we have relied on the evidence gathered in the EC evaluations to assess that the sui generis right does not result in a significant cost to innovation and database users. The EC evaluations involved public consultations, with the latest consultation taking place between May 2017 and February 2018. The conclusions drawn in the EC evaluations relied heavily on the responses of this consultation to present their conclusions. The UK had the third highest responses (behind Germany and Belgium) to the 2018 consultation and no serious concerns with the sui generis right were raised. The status of the sui generis database right could be re-considered after the UK leaves the EU, particularly if further evidence concerning the right becomes available.

Wider impacts

The main groups that will be directly affected are UK creators of databases and UK consumers who access databases. These stakeholders are involved in the software, mapping, digital, and other similar sectors. The Government is of the view that no other stakeholders will be impacted.

Small and Micro Business Impact

Database creators of any sort are entitled to receive the sui generis right; consequently, a significant proportion of right holders are likely to be small and micro businesses. The impact to SMEs has been included in the assessment of costs and benefits under each option. Option 1 places the least burden on SMEs, whereas we have assessed that Option 0.2 (“do nothing”) and Option 2 (“remove the right altogether”), could disproportionately impact SMEs relative to larger businesses. In both these options, creators would likely need to rely on an alternative protection for databases, and this could place a higher burden on SMEs.

To minimise familiarisation costs to businesses (which may disproportionately impact SMEs), the government plans to engage with stakeholders prior to these changes entering into force. The government will publish – prior to legislation being made – a series of technical notices explaining the

impacts of no deal, covering, among other things, sui generis database rights; the European Commission has published similar notices explaining how no deal will affect UK (and EU) stakeholders. The Intellectual Property Office has also held a series of roundtables with industry (including technology firms) in which the effects of withdrawing from the EU on copyright legislation, and the proposed changes thereto, were explained.

Summary and preferred option

The preferred option is option 1. This option provides the greatest continuity and certainty for UK stakeholders. Databases created by UK citizens, residents, or businesses after exit will continue to be protected in the UK under terms equivalent to the existing provisions. Databases created after exit by those in or from the EEA will no longer be protected in the UK; this aligns with the expected post-exit treatment of UK databases in the EEA and could open access to EEA databases for UK database consumers. At the present time, this policy option appears to be best supported by the available evidence and leaves scope for future amendments to the protection of databases should further evidence arise at a later date.

Although the preferred option may involve some familiarisation costs, these may be mitigated by communications to businesses from the government and the European Commission. The government plans to publish – prior to legislation being made – a series of technical notices explaining the impacts of no deal, covering, among other things, sui generis database rights; the European Commission has published similar notices explaining how no deal will affect UK (and EU) stakeholders. The Intellectual Property Office has held a series of roundtables with industry (including technology firms) in which the effects of withdrawing from the EU on copyright legislation, and the proposed changes thereto, were explained.