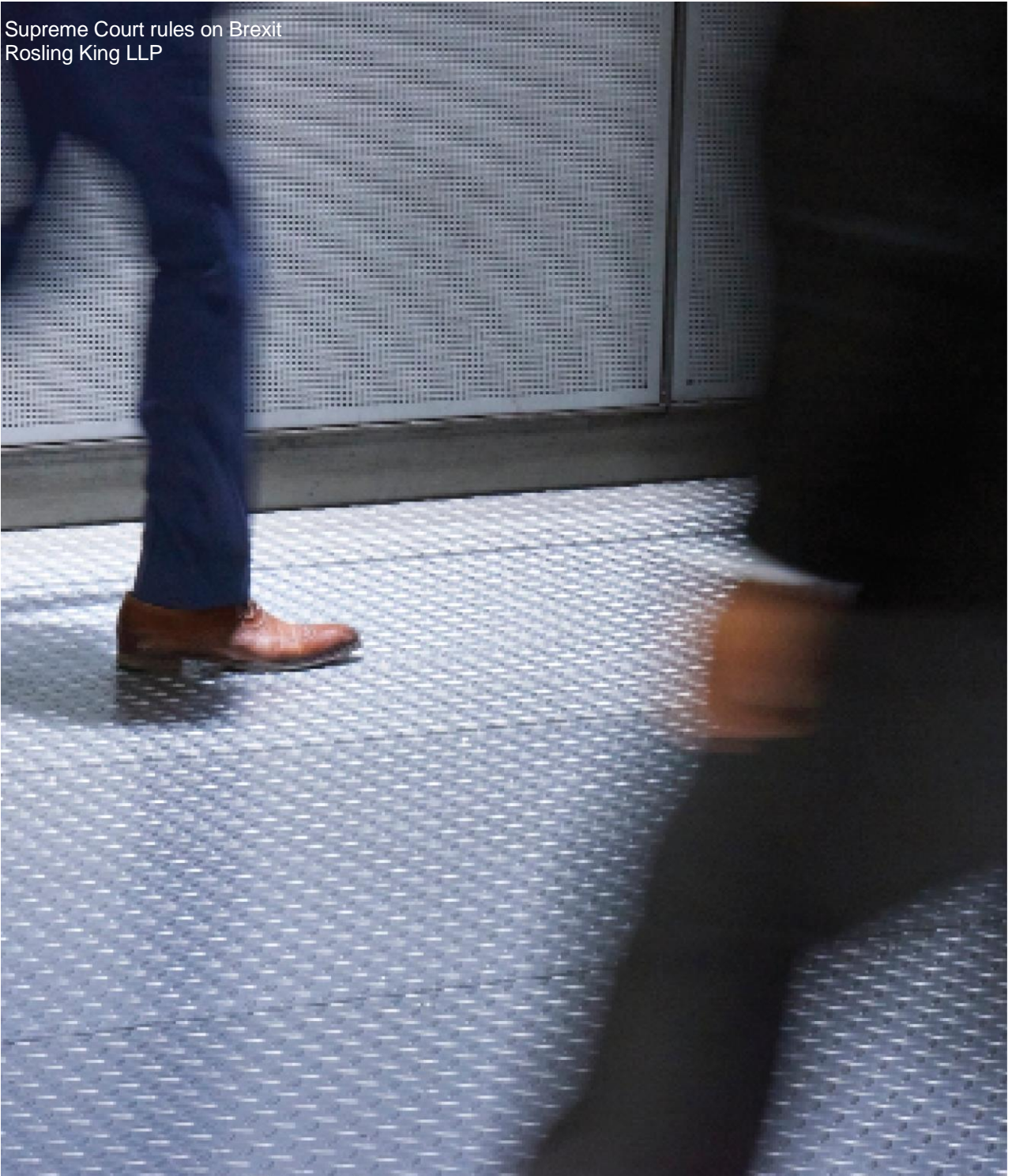


Supreme Court rules on Brexit  
Rosling King LLP



January 2017  
Page 2

The Supreme Court dismisses landmark case and holds that an Act of Parliament is required for the UK to withdraw from the European Union

### Background

In June 2016, the UK voted in favour of leaving the EU in a landmark referendum. A case was then brought against the Secretary of State, as the representative of the Crown, and it was decided by the Divisional Court that the government did not have the prerogative power to invoke Article 50 without an Act of Parliament.

The Divisional Court held that this case was suitable for a 'leapfrog' appeal to the Supreme Court, subject to permission being granted, and the appeal to the Supreme Court was subsequently brought.

The issues on appeal were whether the Article 50 Notice to withdraw (the "Notice") could be brought by the government without the support and authorisation of an Act of Parliament and, further, whether the devolved legislatures in Northern Ireland, Scotland and Wales were required to be consulted prior to the Notice being given.

### The Decision

By a majority of eight to three, the Supreme Court ruled that the European Communities Act 1972 (the "ECA") authorises EU law as a source of UK law which takes precedence over and above UK law. On that basis, the Supreme Court held that EU law is therefore an independent source of domestic law.

It was agreed amongst all parties that UK domestic law will be altered by virtue of the UK leaving the EU. However, the Supreme Court held that there was a fundamental difference between "changes in domestic law resulting from variations in the content EU law" and "changes in domestic law resulting from withdrawal by the United Kingdom from the European Union". The Supreme Court held that invoking Article 50 would fall within the latter and would make an essential difference to the UK's constitution as it would remove EU law from the UK and the UK constitution requires any such fundamental changes to be made by an Act of Parliament.

If this argument was not enough, the Supreme Court went further by stating that by withdrawing from the EU, fundamental domestic rights of UK citizens would be removed which makes it impossible for the government to withdraw without an Act of Parliament.

Further, the Secretary of State argued that section 2 of the ECA does not exclude ministers from withdrawing from the EU and, in fact, enables it by giving effect to EU law only if the UK has not exercised the right to withdraw. The Supreme Court held that withdrawal is not authorised by section 2 of the ECA and if that had been the intention, clear words to that effect should have been included.

The Supreme Court highlighted that the referendum, held in 2016, was of political significance, but if it was intended to have legal significance then Parliament should have



specified the consequences of the referendum in statute.

The dissenting Supreme Court Judges held that the ECA does not affect the Crown's ability to exercise its prerogative powers in regards to the UK's membership in the EU, on the basis that the ECA and its application is "inherently conditional on the application of the EU treaties to the UK and therefore on the UK's membership of the EU." In addition, Lord Carnwath stated that service of the Notice does not, in and of itself, make any change to UK domestic law and, in fact, it is merely a method by which the political process of negotiating the UK's exit from the EU begins.

With regards to the issue of devolution, and whether Parliament will need to consult with the Assemblies, in light of the decision by the Supreme Court, as relations with the EU are reserved to the UK Government at Whitehall, withdrawal remains there too. Further, in regards to the Sewel Convention, this is a political constraint, and it was held that the devolved Assemblies do not have a power of veto over the decision to withdraw from the EU.

#### Commentary

In light of the Supreme Court decision that an Act of Parliament is required to trigger Article 50, a bill will need to be passed by Parliament before the government can begin to negotiate its exit from the EU.

MPs will need to be careful when drafting the bill as whilst, technically, a one line bill is legally possible there is a risk that it could be open to further legal challenge down the line. However, if the bill is too detailed it could open the way for MPs in opposition to propose amendments and delay the process.

Further, the Supreme Court decision provides an important reminder that whilst the referendum had important political implications, its legal significance is entirely dependent on the statute which contains this requirement. If the consequences of the referendum are not specified it legally, although not necessarily politically, leaves it open for Parliament to rule against the public vote.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.