



**On Weighted Voting Rights**  
**「加權投票機制」的一些思考**

by

**Lawrence J. Lau (劉遵義)**

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Institute of Global Economics and Finance  
The Chinese University of Hong Kong  
13/F, Cheng Yu Tung Building, 12 Chak Cheung Street, Shatin, Hong Kong

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# On Weighted Voting Rights

Lawrence J. Lau\*

December 2014

## 1. Introduction

Recently Alibaba went public on the New York Stock Exchange, in one of the largest Initial Public Offerings (IPOs) ever. Alibaba could have made its IPO on the Hong Kong Stock Exchange (HKSE), but its application was rejected by the Listing Committee of the HKSE. Alibaba wanted to have weighted voting rights granted to a group of its founders, led by Mr. Jack Ma, its Executive Chairman, so that they could continue to maintain control of the company even though they collectively did not own a majority of the shares. While there are existing listed companies on the HKSE that have weighted voting rights arrangements, no new listing of companies with weighted voting rights have been approved in recent years. However, weighted voting rights are not uncommon on other stock exchanges, for example, the Dow Jones Company and Ford Motor Company have (or at least used to have) weighted voting rights arrangements for their respective founding family shareholders, as does Alibaba, on the New York Stock Exchange.

What is the principal argument against weighted voting rights in publicly listed companies? It is supposedly based on the concept of equality: every share should be entitled to identical rights, including voting rights in any decision of the company that requires shareholder approval, for example, in the election of the members of the board of directors. Having only one single class of stock also has the advantage of simplicity. However, identical treatment is not necessarily the same as fair or equitable treatment, or even in the best interests of the majority of the

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\* Ralph and Claire Landau Professor of Economics, The Institute of Global Economics and Finance, The Chinese University of Hong Kong. The author wishes to thank Mrs. Ayesha Macpherson Lau for her invaluable advice, comments and suggestions, but retains sole responsibility for any remaining errors. Moreover, all opinions expressed herein are the author's own and do not necessarily reflect the views of any of the organisations with which the author is affiliated. A Chinese version was published in Hong Kong Economic Journal on 19th November 2014.

shareholders, as different investors and shareholders may have different circumstances, interests and needs. These differences are often recognised in actual practice. For example, preferred shares have different privileges and voting rights from ordinary common shares. For another example, the controlling shareholder(s) of a company often must abstain from voting on certain issues. There are circumstances under which weighted voting rights can be shown to be in the best interests of the company and its shareholders.

## **2. Family-Controlled Firms and Weighted Voting Rights**

The most common occurrence of weighted voting rights is in companies in which there is a controlling shareholder, usually the founder of the company. The controlling shareholder and his or her family may not own a majority of the shares outstanding, but desire to control or continue to control the company. A weighted voting rights arrangement will allow the controlling shareholder and his or her family to do so, without having to own a majority of the shares. There are of course other, mostly less transparent, ways of achieving the same result. For example, the founder could form a holding company that owns 51% of the outstanding shares of the company he founded, and then in turn sell 49% of this new holding company to other investors. By controlling the new holding company which in turns controls 51% of the original company, the founder then effectively has majority control over the company he founded. But the cost to him personally is only a little more than 25% of the shares of the original company. The cost could in principle be further reduced to a little more than 12.5% by forming another holding company above the new holding company.

Family-controlled companies have certain advantages over companies in which there is no large shareholder but are controlled and managed by professional managers with little ownership interests of their own in the company. In family-controlled companies, the manager is also a substantial owner, so that there is no conflict of interest between the manager and the owner and by extension between the manager and other shareholders. If the manager makes money for the company, not only does he benefit, but every shareholder also benefits. There is no incentive incompatibility problem. Moreover, the owner-manager is likely to have a much

longer time horizon, plans long-term, and is not subject to moral hazard. A purely professional manager with little or no ownership interests may be more likely to focus on short-term quick gains and more cosmetic improvements and defer needed maintenance. In addition, a purely professional manager may take much higher risks because he or she will be able to share significantly in any gains but will not have to bear any losses, which will be assumed by the owners.

However, in any company with a controlling shareholder also acting as the manager, the connected transactions, that is, transactions between the controlling shareholder and the company he or she manages, must be carefully monitored to prevent the controlling shareholder from taking advantage of the other shareholders. For example, the controlling shareholder may buy assets from the company at below market prices and sell assets to the company at above market prices. That is why in publicly listed companies, connected transactions must be approved by a special vote of the shareholders, in which the controlling shareholder has no right to vote. In addition, there are provisions for the ordinary shareholders to have independent financial advisors paid for by the companies.

It is natural for the founders of successful companies to want to prolong and perhaps perpetuate the control of their companies, even as their companies go public. To have reached the IPO stage, they must have been quite successful—they must have been doing something right. They may have a long-term plan or a long-term vision for their companies that they would like to continue to execute and realise. They would therefore like to stay on to fulfill their dream. They want the assurance of such an opportunity and that is why they would like to have weighted voting rights arrangements for the shares they own in their companies as they go public.

### **3. How Weighted Voting Rights May Benefit Shareholders**

On the basis of the proven records of the founders of these companies, it is possible that the investors and potential investors may also want these controlling shareholder(s) to continue to control the company and to try to induce them to do so by making their control more certain and permanent even if they no longer own the majority of the shares. One of the worst fears that many investors and potential investors in the shares of a new IPO have is that the founder will leave the company

as soon as the lock-up period is over. Another fear is that the company may be taken over by someone else from the founder(s). They would prefer some assurance that the founder(s) will have both the commitment and the incentive to stay on to further develop and grow the company.

One way to accomplish this is to give greater voting power to the shares owned by the founder(s) or controlling shareholder(s). For a purely hypothetical example, if Mr. Steve Jobs were still alive, Apple shareholders might well want to give his shares much greater voting power so that both he and the shareholders could be more certain that he would continue to run the affairs of Apple indefinitely. Apple shareholders might actually prefer to have Mr. Jobs make all the major decisions of the company. Giving a controlling shareholder or shareholder group great voting power is a form of pre-commitment on the part of the other shareholders.

There is actually nothing inherently unfair about a publicly listed company having different shares with different voting powers provided there is full and complete disclosure from the very beginning, from the time of the IPO. Investors who see value in the weighted voting rights arrangement will invest in the shares. Investors who dislike the weighted voting rights arrangement will not invest in the shares. There will be self-selection among the potential investors.

With weighted voting rights, while the controlling shareholder(s) may not own a majority of the shares of the company, they nevertheless will own a significant percentage of the shares, which is also likely to constitute a large percentage of their own net worth. Their interests and the company's interests are therefore aligned. If their company makes money, they make money; if their company loses money, they lose money. By working in their own interests, they benefit the company and the other shareholders as well, and vice versa.

But as in the case of a company that is majority family-owned and -controlled discussed above, the connected transactions between the company and the shareholder group with the extra voting power must also be very carefully monitored to make sure that the other shareholders are treated fairly. This is the responsibility of the independent directors of the company and their independent financial advisers. The same rules that apply to controlling majority shareholder(s) of publicly listed

companies should also apply to the shareholder(s) exercising control through weighted voting rights even though they may own only a minority of the outstanding shares.

#### **4. Balance between Greater Voting Power and Greater Responsibilities**

The more important concept to be considered is that the extra privileges granted to the controlling shareholder(s) in the form of greater voting power should also come with extra obligations. This controlling group of shareholders must commit, in turn, to be long-term holders of the shares in the company. Thus, they should not be allowed to sell, or pledge as collateral, or otherwise engage in derivative transactions effectively equivalent to selling (e.g., buying a put option on the shares of the company) with any of their shares, without giving significant prior public notice. A significant pre-sale waiting period, for example three to six months, should be required. This will allow the ordinary shareholders the time to consider whether they should sell before the controlling shareholder group does or continue to hold their shares.

Moreover, once any of the shares is actually or "constructively" sold or transferred, the greater voting power feature should automatically lapse, not only from the share(s) sold or transferred, but also from all the shares of the controlling group. The new owners of these shares will have the same rights as any other ordinary shareholder, no more, no less. If the new owner(s) would like to have greater voting power in the same way as the previous owners, they would require the explicit approval, perhaps by a super-majority, in a general meeting of the shareholders in which all the ordinary common shares will have the right to vote but not the shares of the new owner(s) desiring greater voting power for their shares.

#### **5. Concluding Remarks**

I believe it is time for the HKSE to revisit the issue of weighted voting rights in companies planning to do an IPO in Hong Kong. Investors can and should be given a choice to invest in a company controlled by a group of minority shareholders with long-term commitments in the company, because they may believe the group to be more able and more dedicated, and the company will be more stable and perform



better in the long run as a result. Full and complete disclosure is the key—investors should buy the shares of this company with their eyes wide open, knowing full well that control will be vested in a small group of minority shareholders. However, the additional responsibilities to be imposed on the shareholder group granted greater voting power and the safeguards for the other ordinary shareholders as discussed in Section 4 above should be instituted.

China is now entering a period in which there are many new successful companies controlled and run by first-generation founder-owner-managers. It may be in their interests as well as potential shareholders' interests for them to remain in control so that they have the commitment and incentive to continue to develop and grow their companies after their IPOs. The HKSE will lose out on these IPOs if it does not modify its rules to allow weighted voting rights so that the different and diverse needs of potential investors can be served in different ways.

# 「加權投票機制」的一些思考

劉遵義\*

2014年12月

## 1. 引言

阿里巴巴最近在紐約證券交易所上市，成為歷來最大的招股上市個案（IPO）之一。阿里巴巴的申請如果不是被香港證券交易所的上市委員會拒絕，該公司可能已在港交所上市了。阿里巴巴希望以董事局主席馬雲為首的一群公司創辦人能夠得到加權投票權，讓他們可以繼續控制阿里巴巴，儘管他們的股權全部加起來也不過半數。

雖然港交所現有部分上市公司採用加權投票機制，但近年來已不再有新上市公司獲得允許採用這個制度。不過，加權投票機制在其他證交所並不罕見，例如道瓊斯公司（Dow Jones Company）和福特汽車都賦予（或至少曾經賦予）創辦家族加權投票權，而在紐約成功上市的阿里巴巴現在也有採用。

關於上市公司採用加權投票機制，反對的主要論點是什麼？主要是關乎平等概念，也就是說，每一股股票的權利應該是相同的，包括所有需要股東通過的公司決策的投票權，例如董事會成員選舉。而且，只有一個級別的股票，也帶來結構簡單的好處。不過，同等待遇不一定就是公平公正的待遇，甚至並不代表是多數股東的最佳利益，因為投資者各有各身處的環境、利益和需要。

這些分別通常在實際運作中會展現出來。舉例說，優先股有着與普通股不一樣的優惠待遇和投票權，另一個例子是控股股東在某些事情上必須放棄投票權。在某些情況下，加權投票權反而可以為公司及股東帶來最佳利益。

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\*作者是香港中文大學藍饒富暨藍凱麗經濟學講座教授。他感謝劉麥嘉軒女士提供的寶貴意見，但會單獨承擔文章中所有錯誤。此外，文章中所有言論純粹代表作者個人立場，並不代表任何與他有關聯的機構或團體。此文已於11月19日在香港信報發表。

## 2. 家族控股公司與加權投票機制

加權投票機制在有控股股東的公司中最常見，而控股股東通常是公司創辦人。他和他的家族可能沒有過半數股權，但渴望控制或繼續控制公司，而加權投票機制讓控股股東及其家族能夠在沒有過半數股權下這樣做。當然，也有其他不如此透明的方式可以達到同一目的，例如創辦人可以成立另外一家控股公司，由這家公司持有原公司 51% 的股權，然後再把新控股公司的 49% 股權賣給其他投資者。由於新公司持有原公司 51% 的股權，創辦人於是成為原公司的實際控股股東，而他所付出的代價只是略高於原公司 25% 的股權。如果在新公司之上再建立另一家控股公司，那代價就可進一步降至略高於 12.5%。

有些公司是沒有大股東的，而是由沒有什麼股權利益的專業管理人員控制並管理；與這些公司相比，家族控股公司有一些優勢。在家族控股公司中，管理人也是大股東，於是公司控股股東與管理人之間沒有利益衝突，由此引伸，管理人員和其他股東亦沒有利益衝突。如果管理人為公司賺了錢，不只他自己受益，公司所有股東都會受益，沒有「誘因不相容」(incentive incompatibility) 的問題存在，而且這些所有者兼管理人在處理公司問題時會看得比較長遠，訂立較長遠的計劃，亦不會牽涉道德風險。相反，只持有少數甚至零股權利益的純專業管理人通常都只想賺快錢，注重一些表面化的改善，延遲進行公司真正需要的維修。此外，純專業管理人往往傾向於高回報但高風險的投資，因為公司有任何利潤，他都能夠分一大杯羹；但他們不用承擔損失，因為任何虧損都會由股東承受。

不過，如果一家公司的控股股東同時也是管理人，那麼所有關聯交易——即控股股東與公司之間的交易——都必須小心監察，以防控股東佔其他股東的便宜。例如，控股股東可能自己私人以低於市價的價錢購進公司資產，或以高於市價的價錢向公司出售資產。這就是為何上市公司的關聯交易都必須經過股東的特別投票，而控股股東在此事上沒有投票權。而且，有條例規定，上市公司需要出錢為一般股東僱用獨立財務顧問。

成功企業的創辦人自然希望股票上市 (IPO) 後也保有控制權，甚至可能想永遠都能控制公司。有能力上市招股的公司，肯定有一定的優勢與成就，而創

辦人可能仍對公司有長遠計劃或遠大理想，希望留下來繼續執行及落實；而為了能確保有這樣的機會，他們會希望在公司上市後得到加權投票權。

### 3. 加權投票機制如何令股東受惠

因為創辦人為公司所做的往績有目共睹，投資者或潛在投資者有可能希望這些控股股東能夠繼續控制公司，為公司努力，並嘗試透過鞏固他們的控制權來吸引他們留下來，即使他們不再擁有多數股權。在新股上市時，很多投資者及潛在投資者其中一個最大的擔心，是創辦人在股票禁售期結束後便會離開公司，也擔心公司會變成由其他人控制。他們都希望能夠確保創辦人有決心和誘因繼續長期推動公司發展和增長。

其中一個方法就是讓創辦人或控股股東有更大的投票權。假使蘋果創辦人喬布斯（Steve Jobs）仍然在世，蘋果股東可能會希望給他更大的投票權，以更確定他會繼續無限期地參與蘋果業務；蘋果股東甚至可能希望公司所有重要決策都由喬布斯做主。給予一名控股股東或一群控股股東更大的投票權，是其他股東作出事先承諾的一種方式。

其實，只要一開始在股票上市（IPO）時便作出全面披露，上市公司有多種不同投票權的股票並不會造成不公平。覺得加權投票機制有好處的投資者自然會入股，不喜歡的就不會投資，潛在投資者可以自行作出不同的選擇。

在加權投票機制下，雖然控股股東可能沒有多數股權，但仍持有大量股票；而且這些股票可能佔他們財產的很大部分，於是他們本身的利益與公司利益變得息息相關。公司賺錢的話，他們也賺錢；公司虧蝕的話，他們也虧損。他們為自己的利益着想的同時，公司和其他股東也受惠，反之亦然。

然而，正如上文所說，公司與持有多數股權的控股股東的交易，需要小心監察；公司與擁有額外投票權的股東之間所進行的關聯交易，亦需要特別留意，以確保其他股東得到公平對待。這是公司獨立董事和獨立財務顧問的責任。適用於上市公司控股股東的規則也應當適用於擁有加權投票權的股東，即使後者只擁有有限的、不過半數的股權。

#### 4. 更大投票權與更大責任之間的平衡

一個更加重要的概念是，通過加權投票機制來控股的股東既然得到更大投票權，就需要肩負更多義務。這些控股股東必須成為長期投資者，不可在沒有顯著提前公佈的情況下，出售公司股票，或將之用作抵押品，又或者參與任何相當於出售公司股票的衍生工具交易，例如購買該公司的認沽期權。想出售股票的控股股東應該遵守一個售前等候期，例如三至六個月，讓一般股東有時間考慮是否在控股股東售股之前先沽貨，還是繼續持有。

此外，這些控股股東一旦出售或轉移股票，加權投票權便應該自動消失；這裏所指的不只是被賣出或轉移的股票的投票權，而是所有這群控股股東持有的股票。被出售或轉移的股票的新持有人所擁有的權利將與一般股東無異。如果新持有人也想得到更大投票權，便需要在股東大會上得到絕大多數股東投票通過，而所有一般股東都有權投票，但想要更大投票權的新股東不應獲准參加投票。

#### 5. 結語

筆者認為，港交所現在是到了應當檢討容許新上市公司採用加權投票機制問題的時候。投資者可以亦應當有權選擇是否投資一家由一群對公司有長遠承諾的少數股東控制的公司，他們可能覺得這些少數股東更有能力、承擔和熱誠，長遠來說可令公司更加穩定發展和表現更佳。全面披露是重要關鍵——投資者在購買這些公司的股票時，應該完全明白它們將由少數股東控制，但同時交易所也應該引入上文第四部分提到的兩個措施：要求擁有更大投票權的股東肩負額外責任，以及加強對控股股東關聯交易的監察，以保障一般投資者的權益。

中國現在進入了一個新階段，很多成功的新民營公司都由第一代創辦人兼所有人兼管理人控制及營運；讓他們保持公司控制權，使他們有決心和誘因繼續在上市後協助公司發展和增長，也許是符合他們本身及投資者利益的做法。如果港交所不修改規定，容許採用加權投票機制，滿足投資者的不同需要，香港便可能會錯失這些公司在香港上市（IPO）的機會。