



**On Weighted Voting Rights**  
**「加权投票机制」的一些思考**

by

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# On Weighted Voting Rights

Lawrence J. Lau\*

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## 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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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.

# 「加权投票机制」的一些思考

刘遵义\*

2014年12月

## 1. 引言

阿里巴巴最近在纽约证券交易所上市，成为历来最大的招股上市个案（IPO）之一。阿里巴巴的申请如果不是被香港证券交易所的上市委员会拒绝，该公司可能已在港交所上市了。阿里巴巴希望以董事局主席马云为首的一群公司创办人能够得到加权投票权，让他们可以继续控制阿里巴巴，尽管他们的股权全部加起来也不过半数。

虽然港交所现有部分上市公司采用加权投票机制，但近年来已不再有新上市公司获得允许采用这个制度。不过，加权投票机制在其他证交所并不罕见，例如道琼斯公司（Dow Jones Company）和福特汽车都赋予（或至少曾经赋予）创办家族加权投票权，而在纽约成功上市的阿里巴巴现在也有采用。

关于上市公司采用加权投票机制，反对的主要论点是什么？主要是关乎平等概念，也就是说，每一股股票的权利应该是相同的，包括所有需要股东通过的公司决策的投票权，例如董事会成员选举。而且，只有一个级别的股票，也带来结构简单的好处。不过，同等待遇不一定是公平公正的待遇，甚至并不代表是多数股东的最佳利益，因为投资者各有各身处的环境、利益和需要。

这些分别通常在实际运作中会展现出来。举例说，优先股有着与普通股不一样的优惠待遇和投票权，另一个例子是控股股东在某些事情上必须放弃投票权。在某些情况下，加权投票权反而可以为公司及股东带来最佳利益。

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\*作者为香港中文大学蓝饶富暨蓝凯丽经济学讲座教授。他感谢刘麦嘉轩女士提供的宝贵意见，但会单独承担文章中所有错误。此外，文章中所有言论纯粹代表作者个人立场，并不代表任何与他有关联的机构或团体。此文已于11月19日在香港信报发表。

## 2. 家族控股公司与加权投票机制

加权投票机制在有控股股东的公司中最常见，而控股股东通常是公司创办人。他和他的家族可能没有过半数股权，但渴望控制或继续控制公司，而加权投票机制让控股股东及其家族能够在没有过半数股权下这样做。当然，也有其他不如此透明的方式可以达到同一目的，例如创办人可以成立另外一家控股公司，由这家公司持有原公司 51% 的股权，然后再把新控股公司的 49% 股权卖给其他投资者。由于新公司持有原公司 51% 的股权，创办人于是成为原公司的实际控股股东，而他所付出的代价只是略高于原公司 25% 的股权。如果在新公司之上再建立另一家控股公司，那代价就可进一步降至略高于 12.5%。

有些公司是没有大股东的，而是由没有什么股权利益的专业管理人员控制并管理；与这些公司相比，家族控股公司有一些优势。在家族控股公司中，管理人也是大股东，于是公司控股股东与管理人之间没有利益冲突，由此引伸，管理人员和其他股东亦没有利益冲突。如果管理人为公司赚了钱，不只他自己受益，公司所有股东都会受益，没有「诱因不兼容」(incentive incompatibility) 的问题存在，而且这些所有者兼管理人在处理公司问题时会看得比较长远，订立较长远的计划，亦不会牵涉道德风险。相反，只持有少数甚至零股权利益的纯专业管理人通常都只想赚快钱，注重一些表面化的改善，延迟进行公司真正需要的维修。此外，纯专业管理人往往倾向于高回报但高风险的投资，因为公司有任何利润，他都能够分一大杯羹；但他们不用承担损失，因为任何亏损都会由股东承受。

不过，如果一家公司的控股股东同时也是管理人，那么所有关联交易——即控股股东与公司之间的交易——都必须小心监察，以防控控股股东占其他股东的便宜。例如，控股股东可能自己私人以低于市价的价钱购进公司资产，或以高于市价的价钱向公司出售资产。这就是为何上市公司的关联交易都必须经过股东的特别投票，而控股股东在此事上没有投票权。而且，有条例规定，上市公司需要出钱为一般股东雇用独立财务顾问。

成功企业的创办人自然希望股票上市 (IPO) 后也保有控制权，甚至可能想永远都能控制公司。有能力上市招股的公司，肯定有一定的优势与成就，而创

办人可能仍对公司有长远计划或远大理想，希望留下来继续执行及落实；而为了确保有这样的机会，他们会希望在公司上市后得到加权投票权。

### 3. 加权投票机制如何令股东受惠

因为创办人为公司所做的往绩有目共睹，投资者或潜在投资者有可能希望这些控股股东能够继续控制公司，为公司努力，并尝试透过巩固他们的控制权来吸引他们留下来，即使他们不再拥有多数股权。在新股上市时，很多投资者及潜在投资者其中一个最大的担心，是创办人在股票禁售期结束后便会离开公司，也担心公司会变成由其他人控制。他们都希望能够确保创办人有决心和诱因继续长期推动公司发展和增长。

其中一个方法就是让创办人或控股股东有更大的投票权。假使苹果创办人乔布斯（Steve Jobs）仍然在世，苹果股东可能会希望给他更大的投票权，以更确定他会继续无限期地参与苹果业务；苹果股东甚至可能希望公司所有重要决策都由乔布斯做主。给予一名控股股东或一群控股股东更大的投票权，是其他股东作出事先承诺的一种方式。

其实，只要一开始在股票上市（IPO）时便作出全面披露，上市公司有多种不同投票权的股票并不会造成不公平。觉得加权投票机制有好处的投资者自然会入股，不喜欢的就不会投资，潜在投资者可以自行作出不同的选择。

在加权投票机制下，虽然控股股东可能没有多数股权，但仍持有大量股票；而且这些股票可能占他们财产的很大部分，于是他们本身的利益与公司利益变得息息相关。公司赚钱的话，他们也赚钱；公司亏蚀的话，他们也亏损。他们为自己的利益着想的同时，公司和其他股东也受惠，反之亦然。

然而，正如上文所说，公司与持有多数股权的控股股东的交易，需要小心监察；公司与拥有额外投票权的股东之间所进行的关联交易，亦需要特别留意，以确保其他股东得到公平对待。这是公司独立董事和独立财务顾问的责任。适用于上市公司控股股东的规则也应当适用于拥有加权投票权的股东，即使后者只拥有有限的、不过半数的股权。

#### 4. 更大投票权与更大责任之间的平衡

一个更加重要的概念是，通过加权投票机制来控股的股东既然得到更大投票权，就需要肩负更多义务。这些控股股东必须成为长期投资者，不可在没有显著提前公布的情况下，出售公司股票，或将之用作抵押品，又或者参与任何相当于出售公司股票的衍生工具交易，例如购买该公司的认沽期权。想出售股票的控股股东应该遵守一个售前等候期，例如三至六个月，让一般股东有时间考虑是否在控股股东售股之前先沽货，还是继续持有。

此外，这些控股股东一旦出售或转移股票，加权投票权便应该自动消失；这里所指的不只是被卖出或转移的股票的投票权，而是所有这群控股股东持有的股票。被出售或转移的股票的新持有人所拥有的权利将与一般股东无异。如果新持有人也想得到更大投票权，便需要在股东大会上得到绝大多数股东投票通过，而所有一般股东都有权投票，但想要更大投票权的新股东不应获准参加投票。

#### 5. 结语

笔者认为，港交所现在是到了应当检讨容许新上市公司采用加权投票机制问题的时候。投资者可以亦应当有权选择是否投资一家由一群对公司有长远承诺的少数股东控制的公司，他们可能觉得这些少数股东更有能力、承担和热诚，长远来说可令公司更加稳定发展和表现更佳。全面披露是重要关键——投资者在购买这些公司的股票时，应该完全明白它们将由少数股东控制，但同时交易所也应该引入上文第四部分提到的两个措施：要求拥有更大投票权的股东肩负额外责任，以及加强对控股股东关联交易的监察，以保障一般投资者的权益。

中国现在进入了一个新阶段，很多成功的新民营公司都由第一代创办人兼所有人兼管理人控制及营运；让他们保持公司控制权，使他们有决心和诱因继续在上市后协助公司发展和增长，也许是符合他们本身及投资者利益的做法。如果港交所不修改规定，容许采用加权投票机制，满足投资者的不同需要，香港便可能会错失这些公司在香港上市（IPO）的机会。