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UP THE HILL AND DOWN AGAIN: CONSTRAINING DUAL-CLASS SHARES

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ABSTRACT. *The headline recommendation of Jonathan Hill's 2021 UK Listing Review was that dual-class shares structures be permitted on the London Stock Exchange's premium tier. The aspiration was to encourage more high-quality UK equity listings, particularly of high-growth tech-companies, for which dual-class shares are especially beneficial. Dual-class shares allow founders to list their companies, and retain majority-control, while holding significantly less of the cash-flow rights in the company. However, in the UK, dual-class shares are usually discussed in qualified terms, in an attempt to placate sceptical institutional shareholders. Using the UK Listing Review as a platform, this article explores the constraints commonly proposed to be attached to dual-class shares, and argues that, although it is important to protect public shareholders, constraints must not be too severe. A balance must be respected, otherwise UK initiatives to relax rules on dual-class shares could deter the very companies they are intended to attract.*

KEYWORDS: *dual-class shares, dual-class stock, Listing Rules, UK Listing Review, sunset clauses, long-termism, big tech.*

I. INTRODUCTION

In November 2020, in the shadow of Brexit, and the emerging potential for the UK to take control of its financial services laws and regulations, HM Treasury commenced a review into the competitiveness of the UK's listed company regime.[1] It would be undertaken in the context of traditional industries being displaced by high-growth technology, e-commerce and science companies,[2] with a view to encouraging "more high-quality UK

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1 HM Treasury, "Call for Evidence – UK Listing Review" (2020), available at https://www.gov.uk/government/publications/uk-listings-review/call-for-evidence-uk-listings-review (all URLs last accessed 24 September 2021 unless otherwise stated).

2 Ibid.

equity listings and public offers".[3] Jonathan Hill, as chair, solicited views and evidence on, inter alia, free-float requirements, prospectus regulations, and, crucially, dual-class shares structures. A dual-class shares structure is where a company issues two (or more) classes of shares, with at least one class having attached to it a disproportionately high level of voting rights (rights to vote at a general meeting of shareholders) as compared to cash-flow or equity rights (rights to dividends or distributions upon a winding-up). Dual-class shares therefore enable a founder of a company to list its company, sell a majority of the existing shares on the public markets, and raise finance for future growth, without losing control. Such a structure can be especially beneficial for high-growth companies from the tech-sphere, since founders may, even upon listing, desire to retain control of the company to pursue an idiosyncratic vision[4] which is not easily observable to the public markets. With control, a founder can cause the company to invest in research and development and other long-term initiatives without fear of removal from the company by the public shareholders or by a predatory acquiror subsequent to short-lived periods of low share price. However, until recently, the most prestigious segment of the London Stock Exchange (LSE)'s Main Market, the premium tier, was hostile to dual-class shares, implementing an effective prohibition when the segment was created.[5]

The concept of dual-class shares pervades the current UK regulatory discourse.[6] The conclusions of the UK Listing Review (the "Review"),[7] published in 2021, appeared finally to climb the steep hill to relaxing the premium tier prohibition of dual-class shares, bringing the UK into line with numerous other major stock exchanges around the world, such as the New York Stock Exchange (NYSE), the Nasdaq Stock Exchange (Nasdaq), Hong Kong, Singapore, Shanghai, India and Tokyo. Although, as the regulator of the Main Market, the Financial Conduct Authority

[3] HM Treasury, "Policy Paper: Terms of Reference: Lord Hill's Review on Listings" (2020), available athttps://www.gov.uk/government/publications/uk-listings-review/terms-of-reference-lord-hills-review-on-listings.

[4] Z. Goshen and A. Hamdani, "Corporate Control and Idiosyncratic Vision" (2016) 125 Yale L.J. 560, 577.

[5] See note 16 below and accompanying text.

[6] BEIS Green Paper, "Building Our Industrial Strategy" (2017) 1, 67, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/611705/building-our-industrial-strategy-green-paper.pdf; FCA Discussion Paper DP17/2, "Review of the Effectiveness of Primary Markets: The UK Primary Markets Landscape" (2017), 1, 1, 8, 22, available at https://www.fca.org.uk/publication/discussion/dp17-02.pdf; HM Treasury, "Financing Growth in Innovative Firms: Consultation" (2017), 1, 33, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642456/financing_growth_in_innovative_firms_consultation_web.pdf; R. Kalifa, "Kalifa Review of UK Fintech" (2021), 1, 65, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978396/KalifaReviewofUKFintech01.pdf.

[7] HM Treasury, "UK Listing Review" (2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966133/UK_Listing_Review_3_March.pdf.

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(FCA) must conclude its consultation process[8] on associated changes to the Listing Rules[9] before the Review's proposals become effective, it does appear that the UK is inexorably on course to relax its rules on dual-class shares. In fact, reports suggest that a company issuing shares (an issuer) in a recent initial public offering (IPO) on the LSE Main Market's standard tier was informally notified prior to IPO that it was likely that dual-class shares will be permitted on the premium tier in the foreseeable future.[10] Whether or not the rules are relaxed after the FCA's consultation, dual-class shares will remain at the forefront of UK corporate governance debates for years to come. However, with the level of hostility to dual-class shares that exists amongst the UK institutional investor community, as evinced during the Call for Evidence phase,[11] any relaxation of the premium tier prohibition on dual-class shares will be accompanied by conditions designed to protect public shareholders from potential abuses of the structure and to appease institutional investors. Accordingly, unlike the US, where dual-class shares are permitted on the NYSE and Nasdaq with very few restrictions, the Review has proposed numerous conditions that it is hoped will maintain the high corporate governance standards of the premium tier.[12]

Subjecting dual-class shares to restrictions resonates with the approach of several Asian exchanges such as Hong Kong, Singapore, Tokyo, India and Shanghai. However, it is not axiomatic that subjecting dual-class shares structures to a package of public shareholder protection mechanisms will continue to support the growth and innovation that such structures are intended to achieve. This article commences by discussing the premium tier's approach to dual-class shares, following which the propensity for dual-class shares in general to satisfy the objectives of the Review will be presented. Using the conditions proposed by the Review as a launching point, this article will then critically assess the types of constraints commonly proposed to be placed upon the operation of dual-class shares structures. It will suggest that it is imperative that the design of constraints that protect public shareholders from potential abuses by controllers must also appreciate the freedom that founders seek through the adoption of dual-class shares to pursue their visions for their businesses. The article will conclude with a discourse on the challenges facing UK regulators in developing rules that balance the interests of public shareholders and founders, especially when confronted with a traditionally powerful body of UK

8 FCA Consultation Paper CP21/21, "Primary Markets Effectiveness Review" (2021), available at https://www.fca.org.uk/publication/consultation/cp21-21.pdf.

9 The Listing Rules sourcebook as published by the FCA exercising its primary market functions, which applies to Main Market-listed companies.

10 T. Bradshaw, "Deliveroo Targets £10bn Valuation in London IPO", *Financial Times*, available at https://www.ft.com/content/f8108b89-419f-40e8-97c9-ce2c15b905e9.

11 H. Jones, "British Company Bosses Warn Against 'Race to the Bottom' in Listing Review", *Reuters*, available at https://www.reuters.com/article/us-britain-ipo-idUSKBN29B1QY.

12 Review, 19.

institutional investors. However, unless that balance is maintained, climbing up the hill to relax the premium tier prohibition of dual-class shares to attract further listings will be nothing but a futile endeavour.

II. Dual-class Shares and the Premium Tier

Although dual-class shares had been previously permitted on the LSE's Main Market,[13] after an informal discouragement of new listings of dual-class shares in the 1960s,[14] in 2010, upon the delineation of the Main Market into premium and standard tiers, non-voting shares were formally prohibited from the premium tier,[15] followed by, in 2014, a de facto premium tier prohibition of classes of shares with voting rights disproportionate to their equity rights.[16] The premium tier was pitched as the most prestigious tier of the LSE, with the highest standards of corporate governance attached, and existing companies with dual-class shares structures were required to shift their inferior-voting shares from the premium tier.[17] Dual-class shares can, though, be listed in the UK on the standard tier and high-growth segment of the Main Market, and, outside of the Main Market, on the Alternative Investment Market (AIM), and the alternative trading platform, Acquis Stock Exchange (Acquis). Therefore, a brief exposition as to why the UK public markets do not already present a welcoming environment for founders wishing to adopt dual-class shares structures is felicitous.

AIM, Acquis and the Main Market's high-growth segment each cater for specific, albeit overlapping, audiences, with investor bases that reflect the types of issuers that float on those exchanges. AIM was established for small, growing companies, with less onerous listing requirements, and Acquis, with its main and growth markets, sits even below AIM with respect to the size of the companies it is attempting to attract. Although the Main Market's high-growth segment was established to attract companies too large for AIM, and, in particular, high-growth tech-companies, it is considered as only a market for mid-sized companies, not able to satisfy the free-float requirements of the premium and standard tiers,[18] and, as of the

[13] Blue-chip companies such as Marks and Spencer, Ranks, and House of Fraser once adopted dual-class shares structures (B. Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford 2008), 317).
[14] Ibid., at 317; B. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford 1997), 472, 475.
[15] Financial Services Authority, "Listing Regime Review: Feedback on CP09/24 and CP09/28 with Final Rules" (2010), available at https://www.fca.org.uk/publication/policy/ps10_02.pdf.
[16] See Listing Rules, Premium Listing Principles 3 and 4. Although, technically, a dual-class structure with unlisted enhanced-voting shares would not be contrary to the Premium Listing Principles, in practice, it would be inadmissible as infringing the spirit of the Premium Listing Principles (FCA Policy Statement PS14/8, "Response to CP13/15 – Enhancing the Effectiveness of the Listing Regime" (2014), 1, 31, available at https://www.fca.org.uk/publications/policy-statements/ps14-8-response-cp13-15---enhancing-effectiveness-listing-regime).
[17] E.g. Schroders, Hansa Investment Company, and Daily Mail and General Trust.
[18] Unless waived, at least 25 per cent of listed shares must in public hands (Listing Rules, rules (LRs) 6.14R, 9.2.15R, 14.2.2R).

date of writing, only three companies have ever listed on the segment. When a company outgrows AIM, Acquis or the high-growth segment, it is likely to desire a graduation to the standard or premium tiers to access the broader base of investors therein, together with the resultant enhanced share price and liquidity. Therefore, even if the openness to dual-class shares of those lesser boards was successful in attracting the high-growth companies pursued by the UK,[19] the growth of such companies would be stunted unless they can "upgrade", and, accordingly, the rules of the standard and premium tier become germane.

As above, dual-class shares are, though, permitted on the standard tier, which does envisage larger company listings. However, as of the time of writing, only three companies have undertaken listings on the standard tier with structures resembling anything like dual-class shares structures – in 2020, The Hut Group floated with the founder holding a single "special share" which, in effect, ascribes the right to block takeovers for a period of three years post IPO,[20] and, in 2021, Deliveroo and Wise listed with more traditional dual-class shares structures ingraining voting control in the hands of founders holding only a minority of the equity for a period of three and five years, respectively, post listing.[21] Even though the US has seen a surge in founders adopting dual-class shares on the listed markets,[22] to the extent dual-class shares can attract founders to list,[23] they have not been attracted in droves by the standard tier's openness to the structure. There are two main reasons. First, the "standard tier" suffers from an identity-crisis, with poorly defined objectives as to the issuers it is seeking to attract and with little to distinguish itself from the premium tier over-and-above permitting laxer listing standards.[24] Issuers and investors alike view the segment as being inferior to the premium tier.[25] The Hut Group, Wise and Deliveroo are unusual in representing large, high-profile,

[19] E.g. see Review, 1, 7.

[20] Upon a change of control, the special shareholder can veto any shareholders' resolution (THG Holdings plc, "Prospectus" (2020), 1, 186, available at https://dl8hes3yo0qpy.cloudfront.net/wp-content/uploads/2020/09/10153258/THG-Prospectus-1.pdf; THG Holdings plc, "Articles of Association Adopted by Special Resolution Passed on 9 September 2020" (2020), articles 69.1, 69.6, available at https://dl8hes3yo0qpy.cloudfront.net/wp-content/uploads/2020/09/10144410/THG-New-Articles-of-Association.pdf.

[21] Deliveroo Holdings plc, "Prospectus" (2021), 1, 3, 21, available at https://dpd-12774-s3.s3.eu-west-2.amazonaws.com/assets/8116/1643/5610/Deliveroo_-_Prospectus.pdf; Wise plc, "Prospectus" (2021), 1, 31–32, 187, available at https://lienzo.s3.amazonaws.com/images/66edcbaae5e13b596fd612fe-de0a9482-Wise_Prospectus.pdf.

[22] In 2020, 15 per cent of US IPOs adopted dual-class shares structures – strikingly, they accounted for 60 per cent of the IPO market capitalisation for the year (Council of Institutional Investors (CII), "Dual-Class IPO Snapshot 2017-2020 Statistics" (2021), available at https://www.cii.org/files/2020%20IPO%20Update%20Graphs%20.pdf).

[23] See Section III below.

[24] Review, 22.

[25] FCA, "Primary Markets Landscape", 19.

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UK standard tier listings,[26] but the restriction to the standard tier (as a result of their capital structures) will have entailed compromises for the companies. For instance, The Hut Group delayed listing until it was sufficiently mature to attract an adequate level of investors and liquidity despite the diminished status of the standard tier,[27] and, in fact, after taking into account IPO pre-allocations (including to existing investors)[28] and private placements,[29] only around 25 per cent of the issued shares in the company became widely available to public shareholders; the existing pre-IPO shareholders retained a majority (and a significant majority of the fully diluted) share capital of the company. Wise, too, was a mature company at the time of listing,[30] and undertook a rare "direct listing" pursuant to which existing shares were admitted to trading but no new shares were offered to the public.[31] The company was therefore not in a position where it needed to attract new investors for equity growth financing.[32] Although Deliveroo listed as a younger company,[33] its business model had been significantly accelerated by the 2020 pandemic,[34] and, again, only a minority of shares were offered to the public, with 70 per cent retained by pre-IPO shareholders,[35] and 30 per cent of IPO shares allocated to three "anchor investors".[36] Notably, speculation was rife that Deliveroo was using the standard tier as merely a staging-post until graduation to the premium tier became possible after the relaxation of its prohibition of dual-class shares.[37] Second, non-premium listed companies are ostracised from the FTSE UK Index Series (including, for example, the FTSE-100 and FTSE-350).[38] Ostracism from the indices is a key reason why the standard tier is considered unattractive,[39] since it excludes issuers from investment by passive

[26] The IPO valuations of The Hut Group and Deliveroo were £5.4bn and £7.6bn, respectively (A. Ramnarayan and S. Cruise, "The Hut Group Shares Soar 30% After Bumper $7 Billion IPO", *Reuters*, available at https://uk.reuters.com/article/uk-the-hut-group-trading/the-hut-group-shares-soar-30-after-bumper-7-billion-london-ipo-idUKKBN2670QJ; T. Bradshaw and A. Mooney, "Disaster Strikes as Deliveroo Becomes 'Worst IPO in London's History'", *Financial Times*, available at https://www.ft.com/content/bdf6ac6b-46b5-4f7a-90db-291d7fd2898d).
[27] The Hut Group was 16 years old at IPO.
[28] THG, "Prospectus", 172.
[29] Ibid., at i.
[30] Wise was 11 years old at the time of its listing.
[31] N. Megaw, "Wise Valued at Nearly £9bn After Record London Direct Listing", *Financial Times*, available at https://www.ft.com/content/811dacb5-a2ed-4208-9b93-41522f3b032b.
[32] Note that Wise's share ownership was already sufficiently dispersed to satisfy the Main Market's free-float requirements (note 18 above).
[33] Deliveroo was eight years old at IPO.
[34] S. Butler and K. Makortoff, "Deliveroo Sets Aside £112m to Cover Legal Costs of Delivery Rider Cases", *The Guardian*, available at https://www.theguardian.com/business/2021/mar/08/deliveroo-losses-flotation-covid-ipo-london-stock-exchange.
[35] Derived from data set out in Deliveroo, "Prospectus", 181–82.
[36] M. Taylor, "Deliveroo's Shares Are a Mess", *Wired*, available at https://www.wired.co.uk/article/deliveroo-ipo-london-debut.
[37] Ibid.; Bradshaw, "Deliveroo Targets".
[38] The FTSE-indices comprise sub-categories of companies ranked by market capitalisation.
[39] Review, 23.

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investors with investment strategies that simply track specific indices,[40] and the corresponding increase in liquidity and share price.[41] Of further importance, given the UK Government's aspirations to "empower" retail investors and increase the opportunities for investors to share in the growth of companies,[42] is that many pension plans and other investment products pursue passive investment strategies, meaning that the capacity for the general public to participate in a diversified manner in the performance of dual-class companies is curtailed if they are restricted to the standard tier and omitted from the indices.[43] As an example, perversely, passive investors tracking the FTSE-100 are currently not able to invest, or share, in the burgeoning post-IPO share price of The Hut Group, even though it would otherwise sit comfortably within the FTSE-100 based upon market capitalisation.[44]

Although the prospects of the standard tier might be improved if it were to be "re-branded" and if standard tier constituents were to become eligible for index-inclusion,[45] in relation to the former, it would take time to change perceptions, and, in relation to the latter, the decision would be in the hands of private index providers in consultation with their institutional investor clients.[46] Additionally, even if issuers were to become more open to the standard tier, they may seek to upgrade to the premium tier in the future. The strength of the UK public markets and its ability to attract high-growth companies are currently intrinsically linked to the admissions requirements of the premium tier. In the next part of this article, the manner in which dual-class shares in general can succeed in attracting those companies will be discussed.

III. Dual-class Shares to the Rescue

In acknowledging the important role that the public markets play in funding company growth and investment, and enabling investors to share in that growth, the Review noted the need to encourage the growth companies of the future to list in the UK.[47] However, recent experience suggests that the LSE's Main Market may not be cultivating an environment

[40] L. Bebchuk and S. Hirst, "Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy" (2019) 119 Colum. L. Rev. 2029, 2044.
[41] B. Sharfman, "A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs" (2018) 63 Vil. L. Rev. 1, 4; S. Hirst and K. Kastiel, "Corporate Governance by Index Exclusion" (2019) 99 B.U.L. Rev. 1229, 1253–54.
[42] Review, 43, 1.
[43] MSCI, "Should Equity Indexes Include Stocks of Companies with Share Classes Having Unequal Voting Rights?", January 2018, 1, 14; A. Grinapell, "Dual-class Stock Structure and Firm Innovation" (2020) 25 Stanford Journal of Law, Business and Finance 40, 74.
[44] As of 23 March 2021, with a market capitalisation of £6.615bn, The Hut Group would have been the 78th largest company within the FTSE-100 (data derived from LSE, "FTSE 100", available at https://www.londonstockexchange.com/indices/ftse-100/constituents/table?lang=en).
[45] E.g. see the recommendations of the Review, 23–24.
[46] In contrast, in the US, S&P, in 2017, excluded dual-class corporations from its S&P Composite 1500 indices (S&P Dow Jones Indices, "S&P Dow Jones Indices Announces Decision on Multi-class Shares and Voting Rights", available at https://www.spice-indices.com/idpfiles/spice-assets/resources/public/documents/561162_spdjimulti-classsharesandvotingrulesannouncement7.31.17.pdf?force_download=true).
[47] Review, 1, 7.

conducive to attracting those companies. The absolute number of companies on the Main Market fell by 57 per cent between 1999 and 2016.[48] Further data suggests a drastic fall of 40 per cent just between 2008 and 2020.[49] The decline does not simply stem from companies leaving the listed sector after public-to-private takeovers, but also ensues from a dearth of new listings. As shown in Figure 1, Main Market IPOs have been moribund in recent years, with annual numbers not recovering to those seen before the 2008 financial crisis. The decay in IPOs is in stark contrast to the rise in private, unlisted, businesses, which have increased in the UK by 72 per cent between 2000 and 2020.[50] Furthermore, the types of companies that do list on the Main Market are not evocative of the "new economy" that the UK is seeking to attract,[51] with companies from such industries only comprising 14 per cent of the market capitalisation of LSE IPOs between 2007 and 2017 – as compared to 60 per cent and 47 per cent on Nasdaq and the NYSE, respectively.[52]

Dual-class shares structures could encourage listings of innovative high-growth companies, especially in the new economy sectors of tech and life sciences.[53] A one share, one vote prescription on the premium tier is not appealing to such companies, due to the loss of control an IPO could entail for a founder of a large, innovative, high-growth company. A one share, one vote premium tier listing could, if the founder does not retain a majority of the votes in the company, result in the founder becoming exposed to the whims of the public markets, since, for a company incorporated in England and Wales, those with majority-voting control can remove directors from the board,[54] have a decisive influence on appointments to the board,[55] and determine the outcome of takeover offers.[56] Since the board determines the strategy of the company, and, almost ubiquitously, has the power to hire

[48] FCA, "Primary Markets Landscape", 42.
[49] Review, 1.
[50] House of Commons Library, "Briefing Paper No. 06152: Business Statistics" (2021), 1, 3, available at https://researchbriefings.files.parliament.uk/documents/SN06152/SN06152.pdf.
[51] See Review, 1–2. The "new economy" describes the economic structure resulting from the intersection of globalisation and information technology (M. Pohjola, "The New Economy: Facts, Impacts and Policies" (2002) 14 Information Economics and Policy 133, 134).
[52] HKEX Concept Paper, "New Board" (2017), 1, 11, available at https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/Concept-Paper-on-New-Board/cp2017061.pdf.
[53] Ibid., at 6.
[54] Companies Act 2006 (CA 2006), s. 168.
[55] Commonly, the articles of association (articles) adopted by public companies are modified versions of the Companies (Model Articles) Regulations 2008, SI 2008/3229 (the Model PLC Articles). Under Model PLC Articles, Article 20, an ordinary resolution, which requires a majority of votes exercised in favour (CA 2006, s. 282), is required to appoint directors to the board or to re-elect at the annual general meeting (AGM) directors previously appointed by the board itself. Furthermore, premium listed companies are required to apply the UK Corporate Governance Code (UK CGC). Although such companies can explain non-compliance with the UK CGC's provisions (applying on a "comply-or-explain" basis), it is expected that all directors will submit themselves to an annual shareholders' vote for re-election (UK CGC, provision 18).
[56] If proceeding as a takeover offer, the minimum acceptance condition must result in the bidder acquiring at least a majority of the target's voting rights (The Takeover Code as published by the UK's Panel on Takeovers and Mergers (Takeover Code), Rule 10). If proceeding as a scheme of arrangement, subject

Figure 1 UK IPOs on the LSE's Main Market 1998–2020 (data derived from: London Stock Exchange, "Reports: Primary Markets, New Issues and IPOs", available at https://www.londonstockexchange.com/reports?tab=new-issues-and-ipos&accordionId=0-838a7e19-eb32-49ba-a1b5-3e4eaea7021b).

and fire the management team,[57] a founder may fear that early- or growth-phase investments in research and development and product-cycles, resulting in short-term share price declines, could lead to the founder being removed from the board by the public shareholders, or removed as an executive indirectly through the public shareholders' influence over board decision-making owing to their control over board composition. Similarly, a decline in share price could expose the company to a predatory takeover bid, subsequent to which the management team is changed by the acquiror.[58] Such fears are especially pertinent in the realm of high-growth tech-companies where forthcoming innovative products may need to be kept confidential,[59] and where the correlation between medium-to-long-term investment and future benefit may not be easily observable to public shareholders,[60] who accordingly undervalue the company. After all, a corollary of the assumption that

to Court sanction, the takeover will be approved by a majority in number holding 75 per cent of the votes of members exercising votes at a Court Meeting (CA, s. 899).

[57] The board, prima facie, has managerial power (Model PLC Articles, art. 3), but will generally delegate to executives under its powers of delegation (art. 5).

[58] In relation to the "market for corporate control", see note 73 below.

[59] Grinapell, "Dual-class Stock", 62.

[60] J. Chemmanur, "Dual Class IPOs: A Theoretical Analysis" (2012) 38 Journal of Banking & Finance 305, 306.

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innovative companies have visionary founders[61] is that those who are not so perspicacious cannot fully appreciate the founder's idiosyncratic vision.

A founder could preserve control by listing and retaining a majority of the shares in the company. However, in so doing, the founder will crystallise less of its investment in the company, and, since further shares issuances will dilute the founder's interest, will be constrained in the level of equity finance that can be raised at IPO and on an ongoing basis.[62] Dual-class shares, could, though, ride to the rescue. By creating classes of shares to which are attached differing levels of voting rights, but equal cash-flow rights, the founder can, by holding enhanced-voting shares and issuing inferior-voting shares to the public, engineer a scenario where it maintains majority-voting control while only retaining a minority of the cash-flow rights. Accordingly, the founder is able to sell a large portion of its investment in the company without losing control, and, by issuing inferior-voting shares, can also raise finance at IPO and post IPO while continuing to retain control.[63] With an unconstrained dual-class structure, with no restrictions as to when enhanced-voting rights can be exercised, the founder can guarantee his/her continued control and tenure as an executive, and takeovers of the company will not proceed without the founder's acquiescence. By assuaging the loss-of-control concerns of founders, dual-class shares can create a more welcoming premium tier ecosystem for tech-companies.

IV. The Need for Constraints

The preceding section of this article paints a pretty picture of dual-class shares. Read in isolation, one may therefore question why dual-class shares structures were ever prohibited from the premium tier in the first place. The reason can be summed-up in four words: "private benefits of control." The concept pertains to the founder exercising its voting control to cause the company to take actions that are personally beneficial to the founder, but potentially detrimental to shareholder-value. A controller of a one share, one vote company, where the controller holds a majority of the shares, could also exercise its voting control in such a manner,[64] but, with dual-class shares, such behaviour is theoretically incentivised further, since the controller receives the full value of the extraction of the relevant private benefits, but only suffers from any commensurate fall in share price in proportion to a potentially disproportionately small equity ownership.[65] The extraction of private benefits can manifest itself in a variety of ways,

[61] Goshen and Hamdani, "Corporate Control", 577; Grinapell, "Dual-class Stock", 61–62.
[62] B. Reddy, "Finding the British Google: Relaxing the Prohibition of Dual-class Stock from the Premium-tier of the London Stock Exchange" [2020] C.L.J. 315, 324.
[63] Ibid., at 324.
[64] B. Reddy, "The Fat Controller: Slimming Down the Excesses of Controlling Shareholders in UK Listed Companies" (2018) 38 O.J.L.S. 733, 736.
[65] F. Easterbrook and D. Fischel, "Voting in Corporate Law" (1983) 26 J.L.E. 395, 409.

from blatant extraction of the company's assets,[66] to more subtle extraction through the pursuit of projects which create financial,[67] or non-pecuniary,[68] benefits for the founder, but which are not optimal for shareholder wealth-maximisation. A detailed consideration of those actions, and, in contrast, the benefits that dual-class shares can bring to the UK public markets, is outside the scope of this article (and has been discussed in depth elsewhere),[69] since this article is primarily concerned with the conditions that may be attached to the acceptance of dual-class shares structures. However, by constraining the ability or scope of a founder to extract private benefits, the consequences of dual-class shares can be better shifted to positive, rather than negative, outcomes for public shareholders. Those constraints could encompass both measures that require enhanced-voting shares to be converted into inferior-voting shares upon events occurring which notionally increase the risks that pernicious private benefits will be extracted (so-called "sunset clauses"), and measures that reduce the incentives or scope for the extraction of private benefits *ab initio*. In the next section, the conditions that are commonly proposed to be attached to dual-class shares structures will be assessed, and it will be suggested that a balance must be preserved, protecting public shareholders on the one hand, and maintaining founder freedom on the other. Much like Goldilocks' infamous, and perilous, sampling of porridge,[70] some conditions blow too hot, some too cold and some are just right.

V. Restrictions on the Exercise of Enhanced Votes

The one hand giveth, the other taketh away. Having empowered founders with disproportional voting rights, an obvious constraint would be to qualify the instances in which those enhanced-voting rights may be exercised. The most restrictive approach would be to limit the exercise of enhanced-voting rights to blocking takeovers. This is essentially the approach recommended by the Review,[71] which has suggested that a takeover bid is

[66] S. Johnson et al., "Tunneling" (2000) N.B.E.R. Working Paper 7523 1, 2, available at https://www.nber.org/system/files/working_papers/w7523/w7523.pdf.

[67] L. Bebchuk, R. Kraakman and G. Triantis, "Stock Pyramids, Cross-ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-flow Rights" in R. Morck (ed.), *Concentrated Corporate Ownership* (Chicago 2000), 303.

[68] R. Gilson, "Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy" (2006) 119 H.L.R. 1642, 1664; A. Dyck and L. Zingales, "Private Benefits of Control: An International Comparison" (2004) 59 Journal of Finance 537, 540.

[69] E.g. Reddy, "Finding", 328–46; B. Reddy, *Founders Without Limits: Dual-class Stock and the Premium Tier of the London Stock Exchange* (Cambridge 2021), ch.6; D. Ashton, "Revisiting Dual-class Stock" (1994) 68 St. John's L. Rev. For a Swedish perspective on dual-class stock in the context of the Review's proposals, see E. Lidman and R. Skog, "London Allowing Dual Class Premium listings: A Swedish Comment" (2021) JCLS, available at https://www.tandfonline.com/doi/full/10.1080/14735970.2021.1968993.

[70] R. Southey, "The Story of the Three Bears" in *The Doctor* (London 1837).

[71] The Review also permits an enhanced-voting shareholder to exercise its enhanced-voting rights on resolutions to approve the holder's personal board incumbency (Review, 21).

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possibly the biggest threat to a founder's ability to bring its vision to fruition after IPO.[72] If takeovers can be blocked, though, an absence of the "market for corporate control" eliminates an important disciplining mechanism on management, since the management team will no longer be incentivised to perform diligently to protect their jobs from a decline in share price that opens-up the company to a takeover bid.[73] The underpinning of the restrictive approach is that by treating the enhanced-voting shares as one share, one vote on all other resolutions of the company, the public shareholders, assuming that they hold a majority of the equity, can still indirectly control the composition of the management team through their influence over the composition of the board,[74] thereby preserving an alternative disciplining mechanism. Ideologically, the restrictive approach may seem to be a happy medium that enables dual-class shares listings without prejudicing the rights of public shareholders if incumbent management is not performing adequately. However, such an approach can create difficulties for founders who seek to retain post-IPO control from three perspectives: board composition, public shareholder blocking rights and proactive public shareholder involvement.

First, founders are likely to covet control over the composition of the board as a whole, and in other jurisdictions, the decision to adopt dual-class shares will have been partly driven by a desire to retain that control. As discussed, the board will have control over the company's strategy, and will have the power to hire and fire managers.[75] Without control over the composition of the board, a founder cannot guarantee its continued tenure as, for example, chief executive officer (CEO) of the company.[76] The founder, realising its worst fears post IPO, has no assurances that public shareholders, using share price as a proxy for CEO performance,[77] will not cram the board with directors hostile to the founder's continuing role as CEO. Even the Review, which advocates the restrictive approach, acknowledges: "When founders bring their companies to market, they often seem to be concerned mostly about their vision not being derailed by being removed as a director/CEO."[78] The divergence between the Review's

72 Ibid., at 20.

73 The "market for corporate control" can engender managerial discipline (H. Manne, "Mergers and the Market for Corporate Control" (1965) 73 Journal of Political Economy 110), but, it could also result in managerial behaviour being overly influenced by short-term share price (e.g. N. Mizik, "The Theory and Practice of Myopic Management" (2010) 47 Journal of Marketing Research 594, 594; M. Moore and E. Walker-Arnott, "A Fresh Look at Stock Market Short-termism" (2014) 41 J. Law & Soc. 416, 430, 438).

74 See notes 54–57 above and accompanying text.

75 Ibid.

76 Although the Review's proposals do also permit a founder to exercise his/her enhanced-voting rights to insulate himself/herself from removal from the *board*, they do not guarantee the founder's continued tenure as a *manager* of the company. The perverse situation could develop where an aggrieved founder, ousted as CEO, remains on the board as a disruptive influence.

77 See notes 57–61 above and accompanying text.

78 Review, 20.

acknowledgement and its approach will have been influenced by evidence that it is unusual for shareholders to remove directors from the boards of Main Market-listed companies.[79] However, shareholders do not have to assert their control directly, and the mere shadow of their powers can influence the behaviour of boards (and, therefore, management).[80] A CEO who ignores the demands of the public shareholders will be playing fast-and-loose with his/her continued employment, since boards can exert significant pressure on CEOs to resign, and being a listed company CEO is certainly not a "job-for-life".[81] Even outside the domain of dismissal, the founder may encounter board opposition (influenced by the powers of public shareholders to remove board members) to its proposed actions or strategies, encumbering the ability of the founder to freely pursue its vision. Famously, the board of the US dual-class corporation, Facebook, was opposed to the founder's decision to acquire Instagram, an acquisition that the founder, overriding the board through his voting control over board composition, continued to pursue and which has created significant value for Facebook over the years.[82] It is exactly the pressure to genuflect to the short-term caprice of public shareholders that founders are seeking to avoid through the implementation of dual-class shares.[83]

Second, the inability to exercise enhanced-voting rights on all shareholder resolutions will prospectively result in the public shareholders maintaining veto rights over *all* actions of the company which require

[79] In 2018, 2019 and 2020, only zero, four and seven, respectively, FTSE-350 director re-election resolutions were rejected by shareholders (with all seven in 2020 occurring at a single company's boardroom coup (Petropavlovsk plc)) (data derived from Practical Law Company, "Annual Reporting and AGMs: What's Market Practice", for 2018, 2019 and 2020), available at https://uk.practicallaw.thomsonreuters.com/Document/I8cf1f4ede82f11e398db8b09b4f043e0/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad6ad3e0000017c175d9f65644701b0%3Fppcid%3D18b574b0f6a4478ba2db8e5b21cfcf04%26Nav%3DKNOWHOW_UK%26fragmentIdentifier%3DI8cf1f4ede82f11e398db8b09b4f043e0%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7a98362ed141fc407cf9fb649ed9596c&list=KNOWHOW_UK&rank=2&sessionScopeId=e334d30b188d678a9ebbfbf6810f9daf9ce66f4b28c2fbc54c6733f152e01898&ppcid=18b574b0f6a4478ba2db8e5b21cfcf04&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=pluk.

[80] Several studies have remarked upon the propensity for management and boards of listed companies to take short-term-orientated decisions in response to short-term orientated shareholders – e.g., Moore and Walker-Arnott, "Fresh Look", 430, 438); J. Ang and W. Megginson, "Restricted Voting Shares, Ownership Structure, and the Market Value of Dual-class Firms" (1989) 12 Journal of Financial Research 301, 305).

[81] Heidrick & Struggles, "Heidrick & Struggles FTSE 350 and Global Surveys Reveal Rising CEO Churn Rate", available at https://heidrick.mediaroom.com/2018-06-05-Heidrick-Struggles-FTSE-350-and-global-surveys-reveal-rising-CEO-churn-rate.

[82] CFA Institute, "Dual-class Shares: The Good, The Bad and The Ugly" (2018), 1, 8, available at https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx.

[83] E.g., the founders of the US dual-class corporation, Alphabet (then Google), stated, upon IPO: "we have set up a corporate structure that will make it harder for outside parties to take over or *influence* Google. This structure will also make it easier for our management team to follow the long term, innovative approach emphasized earlier" (emphasis added): Form S-1/A Amendment No. 8 to Registration Statement of Google Inc. (filed on 16 August 2004), 29). Even the Review states "[a]rguably, that [IPO] is the point at which the company is most at risk of falling sway to the dangers of short-termism by both investors and directors as the public share price provides a daily report card on their decisions": Review, 20. Also see Reddy, "Finding", 328.

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shareholder approval. Several corporate actions require an ordinary resolution (majority vote),[84] or special resolution (voting approval of 75 per cent or more)[85] to be undertaken. Additionally, under the Listing Rules, certain actions require the pre-approval of shareholders holding premium listed shares.[86] The freedom that may be sought by founders in adopting dual-class shares could be appreciably curbed. For example, under Chapter 10 of the Listing Rules, shareholder pre-approval is required for large "Class 1" transactions.[87] Relevantly, an early-stage company, which has yet to generate substantive profits, may find that many potential acquisitions will result in it crossing the thresholds for shareholder pre-approval under Chapter 10.[88] Even though a visionary founder of an innovative, high-growth, founder-led tech-company may see significant long-term value and synergies in making large acquisitions, it will be time-consuming to obtain shareholder pre-approval, preventing the company from acting nimbly and alerting competitors to the possibility of an acquisition, and there is no guarantee that the public shareholders will share the founder's confidence that the relevant acquisition will eventually be successful. By way of example, if Deliveroo were to seek to graduate to the premium tier as reports have suggested,[89] and as a condition of such admission it was required to restrict the founder's exercise of enhanced-voting rights to takeover decisions, as a pre-profit company,[90] its ability to engage in acquisitions quickly and efficiently in what is a saturated industry[91] would be impeded by having to regularly seek shareholder pre-approval. Outside of substantial transactions, public shareholders could also create complications for a founder by not approving director remuneration policies pursuant to their binding voting powers,[92] or by eliciting bad publicity for the company, and the founder, by not approving remuneration actually paid to the founder under the relevant policy, pursuant to their advisory voting

[84] CA 2006, s. 282.
[85] Ibid., s.283.
[86] LR 9.2.21R.
[87] LR 10.5.1R. A transaction is Class 1 if the "percentage ratio" for any class test is 25 per cent or more (LR 10.2.2R). Class tests broadly follow a classification of the size of a transaction compared to the size of the company pursuant to a gross assets test, a profits test, a consideration test and a gross capital test (LR 10 Annex 1).
[88] E.g. if the profits of the target are more than 25 per cent of the profits of the acquiring company, it could constitute a Class 1 transaction (ibid.). In the US, in 2016, 75 per cent of technology listings involved pre-profit companies (HKEX, "New Board", 15).
[89] Bradshaw, "Deliveroo Targets".
[90] Butler and Makortoff, "Deliveroo Sets".
[91] S. Singh, "The Soon to Be £200B Online Food Delivery Is Rapidly Changing the Global Food Industry", *Forbes*, available at https://www.forbes.com/sites/sarwantsingh/2019/09/09/the-soon-to-be-200b-online-food-delivery-is-rapidly-changing-the-global-food-industry/; T. Bradshaw, "Deliveroo's Challenge to Serve up Growth After IPO", *Financial Times*, available at https://www.ft.com/content/5ce64d6e-8ee5-46f6-9580-f59d0708b547. In relation to consolidation elsewhere in the industry, see T. Bradshaw and R. Milne, "Amazon's Deliveroo Investment Approved by UK Regulator", *Financial Times*, available at https://www.ft.com/content/edf8a144-a101-4ef8-80e3-7d2f1565d35c.
[92] CA 2006, s. 439A.

powers.[93] Public shareholders could use such votes to register discontent with the manner in which the company is being managed, or to impose pressure on the founder to take certain actions.[94] These are the types of public market pressures that deter founders from listing in the first place.

Third, public shareholders could proactively create disruption. Shareholders with sufficient votes can cause the company to call a shareholders' general meeting to hear shareholder-proposed resolutions,[95] or can await the annual general meeting (AGM) and propose resolutions for the agenda.[96] In theory, those shareholders could instigate corporate actions, such as amendments to the articles of the company,[97] or even instruct the board to take certain actions.[98] In practice, it is unlikely that public shareholders will be able to corral sufficient votes to take those actions,[99] but one could see potential for public shareholders to undermine the founder's control. As with vetoes, activist shareholders could cause significant disruption by regularly requiring the calling of general meetings to exert pressure on the founder. Such agitations will be off-putting to a founder. A scenario could even be foreseen where, in the midst of a takeover offer that could otherwise be blocked by the founder, activists use shareholder-proposed resolutions to coerce the founder into accepting the offer, or even outside of a takeover offer, activists could use such tactics to compel the founder to voluntarily dismantle the dual-class structure in the hopes of putting the company "into play" and opportunistically soliciting a takeover.

The value of dual-class shares to founders above and beyond the ability to block takeovers can be elucidated from the US experience. Founders have other options to block takeovers in the US, including "blank-check preferred stock plans", "poison pills" and charter supermajority requirements to approve mergers.[100] Founders, however, still appear to be adopting dual-class shares en masse.[101] This is the case even though the

[93] CA 2006, s. 439.

[94] Activist investors may use governance-related issues as a means of exerting pressure on directors (J. Goldstein, "Shareholder Activism and Executive Compensation", (2015) Harvard Law School Forum, available at https://corpgov.law.harvard.edu/2015/06/18/shareholder-activism-and-executive-compensation/; A. Ralph, "Investors Revolt Over Executive Pay at De La Rue", *The Times*, available at https://www.thetimes.co.uk/article/investors-revolt-over-pay-at-banknote-printer-de-la-rue-6x3r87tws).

[95] For companies incorporated in England and Wales, members holding at least 5 per cent of the paid-up capital (that carries the right to vote), or five per cent of the total voting rights may require the directors to call a general meeting (CA 2006, s. 303).

[96] For companies incorporated in England and Wales, members holding at least five per cent of the voting rights, or at least 100 members with a right to vote and average sum paid-up per member of at least £100, can propose resolutions for the AGM (CA 2006, s. 338).

[97] By special resolution (CA 2006, s. 21).

[98] Since management control is in the hands of the board (note 57 above), shareholders can only cause the company to take, or omit to take, actions if the articles so permit (*Automatic Self-Cleansing Filter Syndicate v Cuninghame* [1906] 2 Ch. 34). A special resolution is required under Model PLC Articles, Article 4.

[99] A special resolution requires a seventy-five per cent vote (note 85 above).

[100] For a description of antitakeover devices, see T. Chemmanur et al., "Management Quality and Antitakeover Provisions" (2011) 54 J.L.E. 651, 686–89.

[101] See note 22 above.

empirical evidence on dual-class shares is heavily skewed in the direction of discounted share prices after IPO as compared to similar one share, one vote companies.[102] Since such discounts do not correlate with decreased operating performance or shareholder returns, they represent public shareholders pricing-in the risk that their interests may be expropriated through the extraction of private benefits.[103] In contrast, the empirical evidence on the effect on share price of anti-takeover devices, generally, is more mixed.[104] It would appear that founders are willing to accept higher costs of capital to reap the benefits of being able to insulate all of the directors from public shareholder removal and control the shareholder voting process; dual-class shares are more valuable to founders than simple anti-takeover devices, and it appears that founders appreciate that nuance in practice as well as in theory.[105]

If the principal reason for relaxing the premium tier's dual-class shares prohibition is to attract high-growth, new economy companies to the market, that aspiration will not be satisfied by taking an overly restrictive approach to the exercise of enhanced-voting rights. One may therefore suggest that the more permissive US approach,[106] where there are no mandated restrictions on how enhanced-voting rights may be exercised, should be adopted. However, giving a founder *carte blanche* to exercise enhanced-voting rights on all matters brings with it other pitfalls from a UK perspective. As discussed in more detail later in this article,[107] freshly introducing dual-class shares to the premium tier at this stage of the Main Market's evolution without at least a nod towards UK institutional investor concerns will be politically and diplomatically difficult. Also, even though investors seemingly price-in their risk at IPO,[108] the FCA will further be concerned about the ongoing consequences of dual-class shares rather than simply about pricing, since it has at its heart a mission to protect consumers, protect and enhance the integrity of the UK financial system, and promote

[102] B. Reddy, "More than Meets the Eye: Reassessing the Empirical Evidence on US Dual-class Stock" (2021) 23 U. Pa. J. Bus. L 955, 975–87.

[103] Ibid., at 987–1006.

[104] See the literature review in I. Wanasika and Y. Limbu, "Effects of Antitakeover Defenses on Value in the Pharmaceutical Industry" (2015) 15 American Journal of Management 59, 63.

[105] Ashton, "Revisiting", 927.

[106] Purveyors of "private ordering theory" (e.g. D. Fischel, "Organized Exchanges and the Regulation of Dual Class Common Stock" (1987) U. Chi. L. Rev. 119, 140; Sharfman, "Private Ordering") advocate that the market can simply decide whether to support dual-class shares structures and issuers will organically implement relevant public shareholder protections voluntarily to attract investors. However, the theory relies upon the efficiency of stock market pricing mechanisms to effectively discern the relative value of governance measures (M. Moore, "Designing Dual Class Sunsets: The Case for a Transfer-centered Approach" (2020) W&M B.L. Rev. 93, 123), and such efficiency has been doubted (L. Bebchuk, "Asymmetric Information and the Choice of Corporate Governance Arrangements" (2002) Harvard Law School Discussion Paper No. 398, 1, 4, available at http://www.law.harvard.edu/faculty/bebchuk/pdfs/2002.Bebchuk.Asymetric.Information.pdf).

[107] See Section IX below.

[108] See notes 102 and 103 above.

competition.[109] Additionally, public shareholders in the UK do not benefit from the plethora of litigious tools available in the US – the US enjoys simpler *ex-post* tools to litigate against controlling shareholders after expropriation has taken place (which, in turn, can deter expropriation in the first place),[110] a more open litigious culture,[111] and more plaintiff-favourable civil procedure rules.[112] Furthermore, a competitive advantage could be gained if at least some *ex-ante* protective measures were adopted that place a ceiling on the types of expropriation that could occur – by assuaging public shareholder concerns to a degree, the cost of capital for UK dual-class companies could be reduced, as compared to the US where they are habitually discounted.[113] Therefore, a more granular approach with general scope for founders to exercise enhanced-voting rights, but with restrictions on specifically defined corporate actions, as adopted in a number of other jurisdictions, such as Hong Kong,[114] Singapore,[115] India[116] and Shanghai,[117] could better balance the control sought by founders and protection of public shareholders. The restricted corporate actions must be chosen carefully, though, since the founder must be able to operate the company on a day-to-day basis unhindered by public market pressure, but should not be able to egregiously and opportunistically take actions that expropriate value from public shareholders. Limiting the capacity of a founder to cause a company to engage in large transactions can severely encumber the business strategy of a high-growth company.[118] However, placing restrictions on the founder's ability to, for example, amend the articles of the company, voluntarily wind-up the company, reduce capital, disapply pre-emption rights, appoint auditors, or engage in related-party

[109] FCA, "Our Mission 2017: How We Regulate Financial Services" (2017), 1, 5, available at https://www.fca.org.uk/publication/corporate/our-mission-2017.pdf.

[110] In Delaware, controlling shareholders owe a limited form of fiduciary duty to the company and the minority shareholders (*Ivanhoe Partners v Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987)), which, unless corporate governance protocols are followed, manifests itself in the potential for an *ex-post* entire fairness review of "conflicted" transactions (*Weinberger v UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983)).

[111] A litigious culture is fuelled by the custom for the plaintiff's lawyer to be awarded attorney fees upon either a judgment or a settlement if there is "substantial or common benefit" to the corporation (M. Loewenstein, "Shareholder Derivative Litigation and Corporate Governance" (1999) 24 Del. J. Corp. L. 1, 2), and by the easy access to "opt-out" class action suits federally (US Federal Rules of Civil Procedure (2019 edition), Rule 23(a)) and in many states.

[112] Unlike the UK (Rule 44.2(2)(a), Civil Procedure Rules), the US does not impose default "loser-pay" rules, where the loser is required to pay the costs of the successful party.

[113] See note 102 above and accompanying text.

[114] Hong Kong Listing Rules, Rule 8A.24.

[115] SGX Mainboard Rules, Rule 730B.

[116] SEBI (Listing Obligations and Disclosure Requirements) (Fourth Amendment) Regulations, 2019, Rule 3(VII).

[117] CSRC, "Rules Governing the Listing of Stocks on the Science and Technology Innovation Board of Shanghai Stock Exchange (Revised in 2019)" (April 2019), Article 4.5.10.

[118] See notes 87–91 above and accompanying text.

transactions[119] limits the opportunities for abusive behaviour without undermining the founder's pursuit of its vision.

A wholesale adoption of the approach of those Asian exchanges, though, will not be appropriate in a UK context. All four of those exchanges require all shares to be treated on a one share, one vote basis on resolutions to appoint and remove independent directors.[120] Although independent directors could play an important role in monitoring the actions of controlling shareholders[121] and relating public shareholder concerns to the board, if public shareholders could nominate and appoint their chosen representatives, it could have the inadvertent incentive on a founder not to comply with the UK Corporate Governance Code recommendations that at least half the board, not including the chair, be independent non-executive directors[122] and that the chair be independent upon appointment.[123] In a contentious scenario, a board in compliance could quickly become comprised of a majority of directors appointed by, and loyal to, the public shareholders, thus jeopardising the ability of the founder to manage the company insulated from public shareholder pressure. As discussed, a founder adopting dual-class shares will desire to control the composition of a majority of the board. Public shareholders could, though, be given the right to nominate and appoint a minimum number of, although not all, independent directors or have veto rights over independent directors nominated by the founder.[124] Another feature of the Asian exchanges is the manner in which the restriction is implemented: on specific corporate actions, all shares are treated as one share, one vote. However, in the UK, such a mechanism could allow the public shareholders, if they hold sufficient equity, to unilaterally cause the company to take those actions.[125] Instead, a better mechanism would be a dual-vote system, pursuant to which two voting approvals are required to effect the relevant corporate action: a vote where enhanced-voting rights are respected, and a second vote where all shares are treated on a one share, one vote basis. In that way, the holders of a majority of

[119] Independent shareholder pre-approval is already required prior to the entering into of large related-party transactions outside the ordinary course of business (Listing Rules, Chapter 11), and those requirements could be strengthened for dual-class companies.

[120] See notes 114–117.

[121] E.g. J. Dahya and J. McConnell, "Does Board Independence Matter in Companies with a Controlling Shareholder?" (2009) 21 Journal of Applied Corporate Finance 67, 76.

[122] UK CGC, provision 11.

[123] Ibid., provision 9.

[124] L. Bebchuk and A. Hamdani, "Independent Directors and Controlling Shareholders" (2017) 165 U. Pa. L. Rev. 1271; A. Pacces, "Procedural and Substantive Review of Related-party Transactions: The Case for NCS (Non-controlling Shareholder)-dependent Directors" (2018) E.C.G.I. Law Working Paper No. 399/2018, available at https://ssrn.com/abstract=3167519; Reddy, "Fat Controller", 755. Although for a premium listed company with a controlling shareholder (broadly deemed to be a shareholder holding at least 30 per cent of the votes – LR App 1.1), public shareholders already have, in the first instance, a veto over the appointment of independent directors, the controlling shareholder can still unilaterally appoint that director pursuant to a second vote (LRs 9.2.2ER, 9.2.2FR and 9.2.2DG).

[125] See notes 95–99 above and accompanying text.

the equity will possess a veto right over specified corporate actions (which could potentially be used to harm their interests), but cannot unilaterally cause the company to take those actions. Although a founder of a dual-class shares company holding a majority of the equity would be able to effect the relevant actions on his/her own, the company would be in no worse a position than if it had a one share, one vote controlling shareholder.

The Asian approach to corporate actions, as modified above, strikes an equilibrium between founder latitude and public shareholder protection. Regulators who fear the motives of a founder in taking *management* decisions should, as discussed later in this article, look to other tools to align founder actions with shareholder-value.[126]

VI. Time-dependent Sunset Clauses

Another condition that could be attached to dual-class shares structures is a "time-dependent sunset clause", a concept that has been floated for many years.[127] Regulation could require that the articles of any dual-class issuer include provisions that automatically convert enhanced-voting shares into one share, one vote shares after a specific time period post IPO. The rationale is that the company only requires dual-class shares in the early post-IPO years (when asymmetric information issues may subsist between public shareholders and the founder[128]) to allow the founder to pursue its long-term vision without fear of removal or a takeover if short-term profits are non-existent or minimal. However, as the business matures, with product-cycles becoming more obvious, and business strategy becoming clearly evident, the need for dual-class shares erodes, and the risk increases that dual-class structure is being maintained merely to extract pernicious private benefits.[129]

The challenge with mandated time-dependent sunset clauses is in ascertaining the optimum time period on a one-size-fits-all basis. Although some empirical evidence suggests that the benefits of dual-class shares fade as companies become older,[130] there is no clear bright-line period after

[126] See Section VII below.

[127] E.g. R. Daniels and P. Halpern, "Too Close for Comfort: The Role of the Closely Held Public Corporation in the Canadian Economy and the Implications for Public Policy" (1996) 26 C.B.L.J. 11, 58.

[128] Ang and Megginson "Restricted Voting", 317; Chemmanur, "Dual Class", 306.

[129] L. Bebchuk and K. Kastiel, "The Untenable Case for Perpetual Dual-class Stock" (2017) 103 Va. L. Rev. 585, 605.

[130] H. Kim and R. Michaely, "Sticking Around Too Long? Dynamics of the Benefits of Dual-class Structures" (2018) 1, 5, available at https://ssrn.com/abstract=3145209: finding that young dual-class corporations (less than twelve years old) were valued higher and were more efficient than young one share, one vote corporations, but older dual-class corporations had lower valuations, operating margins, pace of innovation, and labour productivity than similarly-aged one share, one vote corporations. M. Cremers, B. Lauterbach and A. Pajuste, "The Life-cycle of Dual Class Firms: From IPO to Sunset" (2018) E.C.G.I. Working Paper No. 550/2018 1, 30, available at https://ssrn.com/abstract=3062895: finding that although dual-class corporations were valued higher than similar one

which the structure becomes costly to public shareholders. In the US, where time-dependent sunset clauses are not mandated, a handful of dual-class issuers have voluntarily adopted such provisions.[131] Predictably, though, as shown in Figure 2, the time periods adopted for such provisions vary considerably.[132] Even other stakeholders are uncertain of the optimal period. Regulators in India mandate,[133] and the Review proposes,[134] a five-year period, yet the Council of Institutional Investors, a representative body for US institutional investors publicly antagonistic to dual-class shares,[135] recommends a longer period of seven years.[136] Such divergences are unsurprising, since the optimal period will vary on a company-by-company basis, underpinned by a variety of factors, including the maturity of the company at IPO, the length of product-cycles and the nature of the business.[137] An even more esoteric consideration will be the bearing that the time horizon and age of the founder has on the length of the innovative growth phase of the company. It is not feasible to predict at the time of an IPO the exact point in time when the motivations of a controller will diverge from the interests of the public shareholders,[138] and any mandated sunset clause, such as the Review's proposed five-year period, will be completely arbitrary in nature.[139] An obvious consequence is that dual-class structure could be defenestrated too soon, before the founder has had the opportunity to implement its vision or resolve the asymmetric information issues between it and the market as a result of challenges in project observability.[140] Public shareholders could be given the opportunity to extend the sunset period prior to its expiry,[141] but institutional investors, who are traditionally sceptical of dual-class shares, are likely to be opposed to any extension: the very short-term pressures and project unobservability

share, one vote corporations at IPO, the premium declined over time, with them becoming discounted as compared to one share, one vote corporations six to nine years post IPO. However, it is challenging to analyse the empirical evidence on dual-class shares, and studies that evaluate company valuation may in fact be reflecting the market's perception of, rather than the true operating performance or returns of, such companies (Reddy, "More Than", 986–87, 1005).

131 Time-dependent sunset clauses are, however, rare in the US (A. Winden, "Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-class Stock Structures" (2018) 3 C.B.L.R. 852, 870; D. Aggarwal et al., "The Rise of Dual-class Stock IPOs" (2020) 1, 20, available at https://ssrn.com/abstract=3690670).

132 In Figure 2, there is no emerging definitive standard as to an optimal time-dependent sunset period, but the trend is to adopt periods longer than the five years proposed by the Review.

133 SEBI (Fourth Amendment), Rule 3(VII).

134 Review, 21.

135 E.g. CII, "Dual-class Stock", available at https://www.cii.org/dualclass_stock.

136 CII Letter to E. King, Chief Regulatory Officer, International Exchange Inc. (24 October 2018), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024 NYSE Petition on Multiclass Sunsets FINAL.pdf.

137 J. Fisch and S. Solomon, "The Problems of Sunsets" (2019) 99 B.U. L. Rev. 1, 17, available at 1057, 1082.

138 Ibid., at 1082.

139 Ibid., at 1080; Winden, "Sunrise, Sunset", 917; D. Lund, "Nonvoting Shares and Efficient Corporate Governance" (2019) 71 Stan. L. Rev. 687, 739; Moore, "Designing", 148.

140 Winden, "Sunrise, Sunset", 917.

141 In India, public shareholders may extend the initial period for one further five-year period (note 133).

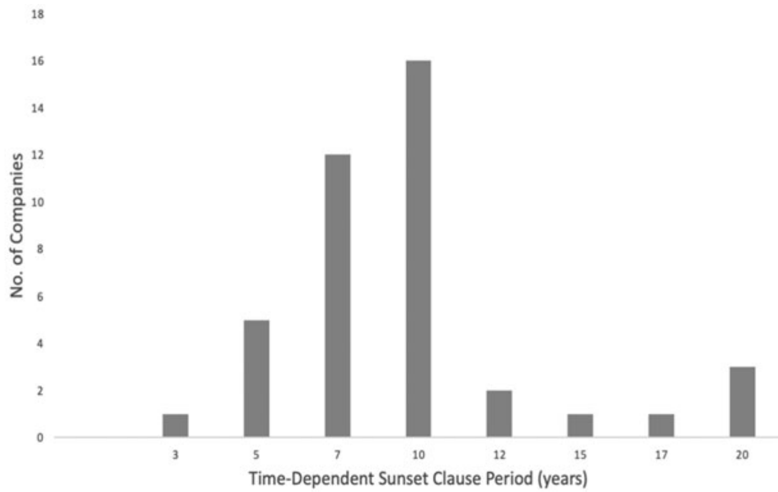

Figure 2 US dual-class shares IPOs adopting time-dependent sunset clauses as of 31 December 2020 (data derived from: CII, "Companies with Time-based Sunset Approaches to Dual-class Stock", available at https://www.cii.org/files/2-13-19 Time-based Sunsets.pdf; CII, "Dual-class IPO Snapshot 2017–2020 Statistics", available at https://www.cii.org/files/2020%20IPO%20Update%20Graphs%20.pdf).

consequences from which founders are insulating themselves through dual-class shares structures will influence the voting of shareholders on the extension.[142] Even if public shareholders were inclined to consider an extension of the structure, to increase the chances of the extension, the founder may find it necessary to cause the company to take actions that are more easily observable to the public shareholders,[143] and, therefore, to forego the more uncertain, innovative projects that dual-class shares structures are intended to encourage.[144] The success of US dual-class corporations such as Facebook, Alphabet and Regeneron which have continued to innovate and create value for public shareholders many years after IPO,[145] could have been curtailed if they had implemented short time-dependent sunset clauses, with or without the option for public shareholders to extend, since it would have required them to shape their business strategies and product-cycles to short-term fluctuations in share price.

Even if the optimal time period could be discerned, although quixotically persuasive, mandatory time-dependent sunset clauses could have a chilling

[142] B. Sharfman, "The Undesirability of Mandatory Time-based Sunsets in Dual Class Share Structures: A Reply to Bebchuk and Kastiel" (2019) 93 S. C.L.R. Postscript 1, 9; Moore, "Designing", 155; Fisch and Solomon, "Problems", 1085; Cremers et al., "Life-cycle", 41.
[143] Sharfman, "Undesirability", 9.
[144] In relation to the capacity for dual-class shares structures to encourage innovation, see Reddy, "Finding", 332.
[145] Facebook, Alphabet and Regeneron listed in 2012, 2004 and 1991, respectively.

effect on an exchange seeking to attract swathes of innovative companies. Founders of truly innovative companies may be reluctant to list in the knowledge that an IPO only grants them a finite period of control within which to pursue their idiosyncratic visions.[146] Furthermore, an exchange mandating time-dependent sunset clauses will suffer from a competitive disadvantage against the NYSE, Nasdaq, Hong Kong, Singapore, Tokyo[147] and Shanghai, with India being the only dual-class shares jurisdiction that also mandates such a sunset.[148] Moreover, as is notable in the context of the UK's aim to attract innovative companies to the LSE at earlier stages of their life-cycles,[149] even if a dual-class issuer were inclined to accept a time-dependent sunset, it is likely that its IPO would be delayed until the founder could be certain that the relevant time period would be a sufficient period of control. Although The Hut Group and Deliveroo both employed time-dependent sunsets of three years, it is questionable whether these companies are truly the innovative tech-start-ups desired. The Hut Group had been promoted as a tech-listing, but some commentators described the company as a retail enterprise, with "tech" only forming a minority of the company's business.[150] It would also be a stretch to describe Deliveroo as operating in an innovative industry, with the online food delivery segment having become extremely saturated,[151] and industry innovation being largely driven outside the delivery service field.[152] The founders and CEOs of The Hut Group and Deliveroo are businessmen rather than the visionary tech-founders of Facebook, Alphabet, Snap, Zoom and many other US dual-class tech-corporations. The Hut Group is also a mature company, listing 16 years after being founded, with venture capital investors, rather than public shareholders, being the beneficiaries of the huge returns during the high-growth phase of the company.[153] Although Deliveroo listed eight years after foundation, the founder acknowledged that the 2020 global

[146] In 2011, the founders of US dual-class corporation Alphabet stated, "it took over three years just to ship our first Android handset, and then another three years on top of that before the operating system truly reached critical mass…We have protected Google from outside pressures and the temptation to sacrifice future opportunities to meet short-term demands" (Alphabet, "2011 Founders' Letter", available at https://abc.xyz/investor/founders-letters/2011/).

[147] Although the Tokyo Stock Exchange, "New Listing Guidebook: 1st and 2nd Sections" (2019) (English), 1, 145, expresses a vague expectation that dual-class structure should dissolve once its purpose no longer exists, a time-dependent sunset clause is only one method of satisfying that expectation, with other forms of sunset also potentially acceptable.

[148] See note 133 above.

[149] Review, 19.

[150] S. Fieldhouse, "The Hut Group IPO: A Retailer Posing as a Tech Company?", *The Armchair Trader*, available at https://www.thearmchairtrader.com/the-hut-group-ipo-a-retailer-posing-as-a-tech-company/.

[151] See note 91 above.

[152] Singh, "Online Food Delivery".

[153] P. Evans and S. Chambers, "Matt Moulding, The Shy Tycoon Who Built a €5bn Hut", *The Sunday Times*, available at https://www.thetimes.co.uk/article/matt-moulding-the-shy-tycoon-who-built-a-5bn-hut-0z23nl92t.

pandemic had accelerated customer take-up of food delivery services by at least three years,[154] and, after much antitrust regulatory scrutiny regarding a 2020 investment by Amazon,[155] it may be that an IPO in a market where the brand is known (and where the company operates in a consumer-facing sector currently divided along continental lines[156]) was the only realistic option for the company and investors. Concerningly, with the imposition of time-dependent sunset clauses potentially deterring numerous early-stage, high-growth innovative companies, a market could develop where it is mainly mature companies, and companies that are less redolent of the "new economy" aspirations of the Review, adopting dual-class shares, for which dual-class shares structure in fact provides little in the way of benefits, and where pernicious private benefit extraction is more likely to overshadow the upsides.[157]

A one-size-fits-all time-dependent sunset clause is a blunt tool. In fact, it is not time per se that causes a change in the dynamics of the company – time is merely a proxy for events that could occur over time that result in greater likelihood of private benefit extraction and/or lesser necessity for dual-class shares.[158] For example, transfers of enhanced-voting shares to a new controller, a new board changing the strategic direction of the company, or simply the skills or interest of the founder waning could all undermine the need for, and benefits of, dual-class shares or result in greater levels of private benefit extraction.[159] Rather than imposing an arbitrary time period which could deter founders, a more targeted approach would be more effective, under which dual-class shares structure is converted into one share, one vote upon specific events taking place. It is simple to tailor provisions to certain events: as below, sunset clauses could be triggered by transfers of enhanced-voting shares or cessation of a founder's influence on the company's strategy.[160] The occurrence of other events, such as when the founder's skills begin to wane, are more ethereal and may be impossible to define accurately. In those cases, though, the approach should be to ensure that the incentives on the founder to take actions that are costly to public shareholders or to voluntarily continue

[154] Butler and Makortoff, "Deliveroo Sets".
[155] Bradshaw and Milne, "Amazon's Deliveroo".
[156] Singh, "Online Food Delivery".
[157] Concern has already been levied at The Hut Group's sale-and-leaseback arrangements with the founder (S. Goodley, "Questions Raised over The Hut Group Boss's Landlord Role", *The Guardian*, available at https://www.theguardian.com/business/2021/jan/11/questions-raised-over-the-hut-group-bosss-landlord-role. Although Wise is a more credible tech-company that has adopted a five-year time-dependent sunset clause, it is a mature company, and only undertook a direct listing (note 31 above), with no new shares being offered to the public and the founders retaining nearly 30 per cent of the issued share capital which will give them significant control even after expiry of the dual-class shares period.
[158] In relation to takeover defences, generally, W. Johnson, J. Karpoff and S. Yi, "The Lifecycle Effects of Firm Takeover Defenses" (2018) 1, 31, available at https://ssrn.com/abstract=2808208; Reddy, "Finding", 342.
[159] Reddy, "Finding", 342.
[160] See Section VIII below.

with a costly dual-class structure are moderated. A solution would be to ensure that the founder has sufficient "skin-in-the-game", to which this article turns next.

VII. Maximum Voting Ratios

Maximum voting ratios operate by placing a cap on the ratio of voting rights attached to an enhanced-voting share to voting rights attached to an inferior-voting share. For example, Hong Kong,[161] Singapore,[162] Shanghai[163] and India[164] mandate maximum voting ratios of 10:1, and the Review proposes a 20:1 ratio for the premium tier.[165] Classically, voting ratios have two roles. First, a maximum voting ratio ensures that the public shareholders have at least a *de minimis* level of votes. A maximum voting ratio could ensure that public shareholders hold sufficient votes to propose shareholders' resolutions.[166] Of course, if the exercise of enhanced-voting rights is already restricted to, for example, the blocking of takeovers,[167] all shareholders would be treated on a *pari passu* basis on all other votes no matter the voting ratio, in which case, the second role is more apropos – a maximum voting ratio essentially requires a controller to maintain a minimum level of skin-in-the-game, capping its incentives to extract private benefits, which rise at an increasing rate as the controller's equity interest declines.[168] For instance, with a voting ratio of 20:1, a dual-class founder seeking to establish majority-voting control would need to hold at least approximately 4.8 per cent of the company's equity. Table 1 sets out the minimum level of equity that a controller must hold to maintain majority-voting control at different maximum voting ratios.

Determining the appropriate one-size-fits-all voting ratio, though, is as challenging as determining the optimal time-dependent sunset period. The market capitalisation of the company will be relevant: 4.8 per cent of the equity is obviously much more skin-in-the-game where market capitalisation is £5 billion compared to just £50 million.[169] Market capitalisation could also vary over time, through share price fluctuations and further finance-raising equity issuances. Additionally, a further consideration is

161 Hong Kong Listing Rules, Rule 8A.10.
162 SGX Mainboard Rules, Rule 210(10)(d).
163 CSRC Rules, Article 4.5.4.
164 SEBI (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2019, Rule 3 (II).
165 Review, 21.
166 See notes 95 and 96 above.
167 See Section V above.
168 Bebchuk et al., "Stock Pyramids", 301; L. Bebchuk and K. Kastiel, "The Perils of Small-minority Controllers" (2019) 107 Geo. L.J. 1453, 1473.
169 Accordingly, in Hong Kong, enhanced-voting shareholder mandatory equity ownership requirements may be lowered if the market capitalisation of the company is HK$80 billion or more (HK Listing Rules, Rule 8A.12).

Table 1: Minimum equity above which majority-voting control can be preserved as a factor of enhanced-voting share:inferior-voting share voting ratio

Voting ratio	Minimum equity above which majority-voting control preserved
20:1	4.8%
10:1	9.1%
5:1	16.7%
4:1	20.0%
3:1	25.0%
2:1	33.3%
One share, one vote (1:1)	50.0%

personal net-wealth, with a given voting ratio having different bearings on the behaviour of a founder depending upon the gains he/she has made at or pre IPO. Other business interests of the founder may also be pertinent.

Therefore, a progressive avenue would be to instil flexibility. The FCA could mirror its approach to the free-float rules, by imposing a default requirement that could be waived or revised on a case-by-case basis.[170] Furthermore, rather than implementation by way of voting ratio, consideration should be given to, instead, requiring a founder to retain a specific number of equity shares based upon a percentage of the issued shares as of the date of IPO (as adjusted on a continuing basis for future non-cash share splits, bonus shares and reorganisations). If the founder disposes of sufficient shares to drop below the relevant threshold, its enhanced-voting shares would convert into one share, one vote. Such a "divestment sunset" presents advantages over maximum voting ratios, since a voting ratio could create the perverse post-IPO disincentive on the founder to issue further equity for finance since, if the founder already owns the minimum level of equity to retain majority-voting control, it would have to subscribe to further equity shares in the issuance to maintain that majority-voting control. Since the relevant threshold could be lowered by the FCA in its discretion, and, with a divestment sunset, it will not organically increase the amount of equity required to be held with escalating market capitalisation over time, the default can be set relatively high. The default should represent a legitimate level of skin-in-the-game, but not be so high that it prevents a founder from crystallising significant wealth on IPO and leading to issuers dismissing a premium listing out of hand. It is difficult to contend, though, that 4.8 per cent,[171] for example, is generally a sufficient level of skin-in-the-game to substantively disincentivise a controller from extracting substantial private benefits, other than possibly with the largest of listings. It is likely that such a founder will have garnered sizable riches by

[170] See note 18 above.
[171] As per the Review's proposals (note 165 above).

substantially exiting its investment in the company at IPO, and, consequently, 4.8 per cent will not represent a meaningful constraint on the controller. The situation is exacerbated if, owing to the dispersed nature of the remainder of the shares held by public shareholders,[172] the founder can maintain "effective control" with less than, and in some cases, substantially less than, a majority of the votes in the company.[173]

The default level for the premium tier should be carefully considered, but it could be set higher than that of the Asian exchanges[174] and still remain competitive. Unlike with the divestment sunset described, a founder listing on the Asian exchanges must continue to participate in fresh share issuances in order to retain majority-voting control while holding the minimum level of equity. Such a requirement can be consequential for high-growth tech-companies where acquisitions financed through the issuance of shares (either to the sellers as consideration or to the market to generate cash) can be essential for growth. Although a founder wishing to create an extreme divergence between voting and cash-flow rights may be attracted to the US, where no minimum equity retention requirements are regulatorily imposed, in practice, it seems that founders do not regularly seek to extravagantly depress their equity interests. Table 2 summarises hand-collected founder equity ownership information for the 10 largest (by market capitalisation) founder-led dual-class corporations that listed in the US after 2000, as at IPO and as of 2020. Most of those corporations listed with the founders holding at least 15 per cent of the equity, and, in many cases, far more. Although, post IPO, many of those founders have reduced their equity ownership percentages, those figures include dilution from post-IPO equity issuances, which would not be taken into account when applying a divestment sunset (as opposed to a maximum voting ratio). Further research in this area would be welcome, but, based upon more recent large US dual-class IPOs, a default level of around 15 per cent, which under the proposals in this article could, in any case, be relaxed in the discretion of the FCA, would appear to satisfy the balance between attracting issuers and protecting public shareholders. Taking the two most enduring corporations in Table 2 (Facebook and Alphabet) as of 2020, those corporations had been listed for eight and 16 years, respectively, and the founders owned approximately 13 and 11.5 per cent of the equity,

172 In a dispersed ownership system, due to a tendency for shareholders to free-ride on the research and monitoring efforts of other shareholders and challenges in acting collectively, a blockholder with a marginally large interest can exert significant and disproportionate influence (D. Ratner, "The Government of Business Corporations: Critical Reflections on the Rule of One Share, One Vote" (1970–1971) 56 Cornell. L. Rev. 1, 19).

173 By analogy, under the mandatory offer rules of the Takeover Code, 30 per cent of the voting rights is deemed to engender effective control (Rule 9.1).

174 Hong Kong (Hong Kong Listing Rules, Rule 8A.12) and Shanghai (CSRC Rules, art. 4.5.3) require, on top of 10:1 maximum voting ratios, that the holders of enhanced-voting shares hold at least (or more than, in the case of Shanghai) ten per cent of the cash-flow rights in the company on an on-going basis. Singapore and India apply solely 10:1 voting ratios (see notes 162 and 164 above).

Table 2: Founder(s) equity ownership for the top 10 (by way of market capitalisation) US dual-class corporations with post-2000 IPO dates (data hand-collected from the Securities and Exchange Commission's (SEC's) "Edgar website" – 2020 equity ownership was derived from the most recent public filings as of 17 September 2020; market capitalisation rankings determined as of 17 September 2020 from the constituents of the MSCI USA Index, available at https://www.msci.com/constituents)

Corporation	IPO-date	Founder(s) equity as of IPO	Founder(s) equity 2020
Facebook	2012	23.55%	12.90%
Alphabet	2004	28.07%	11.40%
Workday	2012	63.25%	25.91%
Square	2015	30.29%	17.09%
Veeva	2013	14.89%	11.47%
Twilio	2016	10.40%	5.20%
Okta	2017	14.60%	8.90%
Zoom	2019	19.08%	16.18%
RingCentral	2013	25.74%	10.83%
Snap	2017	36.10%	28.62%

respectively. Both corporations, though, have issued substantial levels of shares post IPO for financing and acquisition purposes, and, therefore, in the context of a divestment sunset (a limited form of which has been implemented by Alphabet[175]), the founders would still hold well above 15 per cent of the IPO-date outstanding shares.[176]

A handful of dual-class founders shown in Table 2 have clearly substantially reduced their equity holdings in a much shorter period than Facebook and Alphabet through divesting of shares rather than dilution – however, they are in the minority, and the premium tier should not be so welcoming to companies that intend to implement such excessive divergences between voting and cash-flow rights. An appropriate level of skin-in-the-game is potentially the most crucial form of public shareholder protection for dual-class companies. For example, a founder whose interest has waned will be more open to stepping-down from management and handing the reigns to a fresh management team that will increase shareholder-value if that founder has more than a negligible level of wealth still tied up in the company.[177] Equally, the founder may even be willing to collapse the dual-class structure voluntarily if it will create an uplift in share value at a time when

[175] Each Alphabet founder has contractually agreed not to dispose of non-voting shares to the extent that it will result in him holding a greater number of ten-votes-per-share shares than non-voting shares (see Form 8-K of Alphabet Inc. dated 2 October 2015).

[176] Using data gathered from the most recent (as of 17 September 2020) Form-4 and Form-5 insider trading filings, the equity ownership of Facebook's founder and Alphabet's founders (adjusting for Alphabet share splits post IPO), in 2020, represented approximately 17 per cent and 25 per cent of the IPO-date equity, respectively.

[177] See note 202 below and accompanying text.

the need for dual-class shares has eroded.[178] A divestment sunset will mitigate insidious behaviour *ab initio*, and, since the divestment of equity post IPO is in the hands of the founder, will be more attractive to founders than the cliff-edge of an arbitrary time-dependent sunset.

VIII. Transfer-linked and Director-linked Sunset Clauses

Two common conditions attached to dual-class shares structures, and also proposed by the Review for the premium tier,[179] are restrictions on the capacity to hold and transfer enhanced-voting shares. Essentially, these are event-driven, more specifically, "transfer-driven" and "director-linked", sunset clauses, since enhanced-voting shares automatically convert into one share, one vote upon a restricted transfer, or upon the holder ceasing to be a director. Hong Kong,[180] Singapore,[181] Tokyo,[182] India[183] and Shanghai[184] have all mandated transfer-driven sunset clauses, and, even in the US, it is not uncommon for transfer-driven sunsets to be voluntarily adopted.[185] Director-linked sunset clauses are also mandated in Hong Kong,[186] Singapore[187] and Shanghai,[188] and, in the US, the voluntary uptake of related death or incapacity sunsets has become more common in recent years.[189]

A transfer-driven sunset can be easily espoused. Institutional investors readily, albeit perhaps reluctantly, invest in dual-class shares structures.[190] However, heavily factored into any investment decision is their faith in the enhanced-voting shareholder. This is particularly pertinent where the exercise of enhanced-voting rights is unrestricted and the founder is entrenched as CEO. Institutional investors will be overtly backing the founder's talent and vision for the company,[191] and pricing the securities accordingly. As the Review states: "Their vision and their ability to execute that vision is

[178] Inferior-voting shares of dual-class shares structures are often discounted by investors (see notes 102 and 103 above and accompanying text).
[179] Review, 21.
[180] Hong Kong Listing Rules, Rule 8A.18.
[181] SGX Mainboard Rules, Rule 210(10).
[182] Tokyo Guidebook, 147.
[183] SEBI (Fourth Amendment), Rule 3(VII).
[184] CSRC Rules, Article 4.5.10.
[185] Winden, "Sunrise, Sunset", 881.
[186] Hong Kong Listing Rules, Rule 8A.11.
[187] SGX Mainboard Rules, Rule 210(10).
[188] CSRC Rules, Article 4.5.3.
[189] Winden, "Sunrise, Sunset", 875.
[190] The empirical evidence as to whether institutional investors shun dual-class corporations in the US is inconclusive. Finding institutional investor ownership in dual-class corporations was the same or greater than such ownership in one share, one vote corporations: R. Anderson, E. Ottolenghi and D. Reeb, "The Dual Class Premium: A Family Affair" (2017) 1, 28, available at https://ssrn.com/abstract=3006669; S. Smart and C. Zutter, "Control as a Motivation for Underpricing: A Comparison of Dual and Single-class IPOs" (2003) 69 Journal of Financial Economics 85, 98. Finding slightly less institutional ownership of dual-class corporations: K. Li et al., "Do Voting Rights Affect Institutional Investment Decisions? Evidence from Dual-class Firms" (2008) 37 Financial Management 713, 720.
[191] Reddy, "Finding", 342; Moore, "Designing", 142.

often part of the company's selling point."[192] If a fundamental motive for dual-class shares is to give founders a transition period during which they can pursue their visions insulated from the public shareholders, its justification falls away upon transfers of voting control to other persons. Exceptions to the transfer-driven sunset could be permitted, so long as they do not run a cart and horses through the protective measure. Exceptions for transfers for estate planning or charitable purposes, provided that the transferor continues to have control over voting decisions of the transferee, would be acceptable.[193] In contrast, wide exceptions to allow unencumbered transfers to family members, as preserved by Deliveroo for example,[194] are less easily justifiable.[195] Although a founder may believe that a family member can continue his/her legacy, research has shown that company performance deteriorates when family members assume management from founders.[196]

A director-linked sunset ensures that the enhanced-voting shareholder is engaged in the running of the company,[197] and further reflects the contention above that investors are buying shares based upon their faith in the founder's vision. If the founder is no longer driving the strategy of the company, the validation for retaining disproportionate control crumbles. From a UK perspective, a director-linked sunset also has another positive consequential effect by subjecting any founder holding enhanced-voting shares to the directors' duties regime.[198] Although practical and legal impediments can moderate the capacity of those duties to deter misconduct or mismanagement,[199] at least a baseline level of accountability will exist against which the founder's actions can be gauged.

[192] Review, 20.

[193] E.g. the Review alludes to similar exceptions (Review, 21). Hong Kong permits transfers of enhanced-voting shares to entities that will hold the shares on behalf of the transferor (Hong Kong Listing Rules, Rule 8A.18(2)).

[194] Deliveroo, "Prospectus", 170.

[195] E.g. H. Huang, W. Zhang and K. Lee, "The (Re)introduction of Dual-class Share Structures in Hong Kong: A Historical and Comparative Analysis" (2019) J.C.L.S. 1, 16.

[196] A breadth of empirical literature has noted the propensity for performance of companies to decline upon control transferring to heirs – e.g. R. Morck, D. Stangeland and B. Yeung, "Inherited Wealth, Corporate Control, and Economic Growth: The Canadian Disease" in Morck (ed.), *Concentrated Corporate Ownership*, 338; R. Barontini and L. Caprio, "The Effect of Family Control on Firm Value and Performance: Evidence from Continental Europe" (2006) 12 European Financial Management 689; M. van Essen et al., "How Does Family Control Influence Firm Strategy and Performance? A Meta-analysis of US Publicly Listed Firms" (2015) 23 Corp. Gov. 3, 18.

[197] Review, 21.

[198] Directors of companies incorporated in England and Wales owe duties to the company under CA 2006 (ss. 171–177). Even for foreign incorporated companies, directors owe duties in most jurisdictions (Practical Law Company, "Corporate Governance and Directors' Duties: Global Guide", available at https://uk.practicallaw.thomsonreuters.com/Browse/Home/International/CorporateGovernanceandDirectorsDutiesGlobalGuide?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk).

[199] In relation to mismanagement, the Courts have generally taken a deferential approach to managerial decisions of directors (*Smith v Fawcett* [1942] Ch. 304, 306; *Burland v Earle* [1902] A.C. 83, 93). Even in relation to misconduct, public company boards rarely commence claims against directors, and although shareholders can commence derivative claims on behalf of companies (CA 2006, ss. 260–264), under the procedure, a number of hurdles, the application of which is not always certain,

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Of course, the founder being a director is not a surety that the founder will play an integral role in guiding the company's strategy. If the founder is not also intrinsically involved in day-to-day management, his/her non-executive directorship could represent no more than a bauble on a Christmas tree, as was once infamously remarked.[200] Tokyo and India have tacitly accepted this subtlety by taking a stricter approach which requires, in most circumstances, that the enhanced-voting shareholder remains as an executive manager.[201] However, from a practical perspective, it is challenging (to say the least) to draft regulatory rules which adequately define an executive employment role of sufficient seniority and genuine in substance as well as form. A founder with control over the composition of the board could easily "game" the system. Such a "manager-linked" (as opposed to director-linked) sunset could create unintended consequences, and result in a founder CEO "hanging-on" too long past his/her expiry date. If a management-linked sunset clause had been in operation at Alphabet, where the founders remain on the board but have stepped away from their CEO and President roles,[202] they might not have been so enthusiastic to usher in a fresh CEO as they would have also lost control of their company. Although in an ideal world manager-linked sunsets are commended, from a practical perspective, mandated director-linked sunsets would be more effective on the premium tier.

The adoption of transfer-driven and director-linked sunset clauses would be a cogent approach for the premium tier to take. They respect the balance between ensuring that investors get what they have bargained for and ensuring that a founder can pursue his/her personal vision for the business. They strike at the heart of events that could occur which undermine the legitimacy of dual-class shares structures,[203] and collapse the structure into one share, one vote with surgical precision, making the blunt trauma of a time-dependent sunset clause all the more jarring.

IX. The "Policy Minefield"

In this article, in the context of the UK's premium tier finally entertaining the possibility of dual-class shares, the most common varieties of investor

must be cleared before leave will be granted to hear the case (J. Armour, "Derivative Actions: A Framework for Decisions" (2019) 135 L.Q.R. 421). Additionally, if the shareholders are dispersed, each only holding a small portion of the equity, the costs and effort in commencing a claim may outweigh the benefits which accrue solely to the company, and even free-riding non-intervening shareholders can share in those benefits.

200 The quote is attributed to the late Tiny Rowland, former CEO of Lonrho plc.

201 In Tokyo, the enhanced-voting shareholder must remain as a director and manager if the dual-class structure has been implemented to ensure the continued involvement of a person in management (Tokyo Guidebook, 146), and, in India, such a shareholder must remain as an "executive" in the company (SEBI (Third Amendment), Rule 3(II); SEBI (Fourth Amendment), Rule 3(VII)).

202 Alphabet, "A Letter from Larry and Sergey", available at https://blog.google/inside-google/alphabet/letter-from-larry-and-sergey.

203 Also see text accompanying notes 158 and 159 above.

protections have been canvassed. A common thread is the importance of providing credible comfort for public shareholders that their interests will not be egregiously expropriated, without undermining the very reasons that a founder may seek the succour of dual-class shares structure in the first place. The dual-class shares path that the UK takes over the coming years will characterise the trajectory of the LSE for decades to come, and it is vital that the regulators appropriately weigh the competing tensions. However, that regulatory path is mired in peril. UK regulators must contend with highly influential UK institutional investors who are traditionally opposed to any initiatives that dilute shareholder rights,[204] and have, in the past, denounced dual-class shares. UK institutional investors focus on the costs of dual-class shares structures created by an attenuation of their powers to influence the management of companies and discipline self-serving managers. Although the ability of such managers to exploit their control by siphoning assets from the company or engaging in conflicted transactions should be substantively restrained by strong UK anti-fraud rules, audit requirements, financial press, and, on the premium tier, related-party transaction regulations,[205] institutional investors will still be concerned that founder control could manifest itself in the company taking actions primarily in the interests of the founder rather than shareholder wealth-maximisation,[206] or the entrenchment of a management team unsuited to leading the company.[207] Those concerns will reverberate with the UK regulators, since, historically, the UK regulators have been heavily influenced by the views of UK (particularly "long-only") institutional investors, who have often engaged in extensive collaborative lobbying and have regularly played a significant role in the development of market regulations.[208] That direct influence harks back to an era when UK pension funds and insurance companies were the dominant players on the UK equity markets.[209] The views of UK institutional investors on dual-class shares and the influence they can exert will have led to the Review taking a half-hearted premium tier approach to dual-class shares and adopting a suite of constraints which, as discussed in this article, are likely to deter the very founders the Review is seeking to attract.

[204] E.g. see The Investor Forum (a UK representative body for asset managers and asset owners), "Response to Call for Evidence – UK Listing Review", available at https://www.investorforum.org.uk/wp-content/uploads/securepdfs/2021/01/UK-Listings-Review-January-2021-002.pdf. Also see P. Stafford and A. Mooney, "Investors Push Back Against UK Listings Overhaul", *Financial Times*, available at https://www.ft.com/content/8ed0d759-c34f-4f3f-a076-6461093da6a2.

[205] See Chapter 11 of the Listing Rules.

[206] See notes 67–68 above and accompanying text.

[207] Reddy, "Finding", 341.

[208] L. Enriques et al., "The Basic Governance Structure: Minority Shareholders and Non-shareholder Constituencies" in R. Kraakman et al. (eds.), *The Anatomy of Corporate Law* (Oxford 2017), 104; J. Armour and D. Skeel, "Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation" (2007) 95 Geo. L.J. 1727, 1771.

[209] For example, in the early 1990s, such investors owned over half of the shares in UK-listed companies (B. Cheffins, "The Stewardship Code's Achilles' Heel" (2010) 73 M.L.R. 985, 1020.

One may query, though, why institutional investors should take such a conservative position on shareholder rights in the context of dual-class shares when the empirical evidence does not show that dual-class companies perform worse, from the perspective of operating performance and buy-and-hold returns, than one share, one vote companies,[210] and where concerns that they could be lumbered with a self-serving dual-class shares controller or an underperforming management team can be mitigated through the judicious use of transfer-driven sunset clauses and ensuring that the controller has sufficient skin-in-the-game. Their position, though, betrays underlying tenets, with UK institutional investor views on dual-class shares being a microcosm of their resistance to reform of the equity markets generally. The importance UK institutional investors attach to maintaining shareholder rights will partly stem from them coveting their perceived dominion over company boards that coerces those boards into continuously heeding share price, and, relatedly, a desire to preserve their position as the dominant influence on UK corporate governance policy. They will fear that the influence over the regulators that they have enjoyed for decades will diminish if their power to exert influence over corporate actions in the listed markets is also moderated. By way of comparison, institutional investors have not enjoyed quite such a historic dominance over corporate managers in the US, and when the NYSE was considering the relaxation of its erstwhile prohibition of dual-class shares structures in the late 1980s and early 1990s, institutional investors did not dominate the market to the same extent as the UK during that period,[211] leading to the broadly permissive dual-class shares rules now apparent on the NYSE. Additionally, UK institutional investors are becoming more global themselves,[212] and reforms designed to attract contemporary, high-growth, new economy IPOs on the LSE will not be a priority for those investors when they can maintain exposure to such companies through investments on foreign exchanges and even, in some cases, in private equity funds.

Similarly, one may also query why the UK regulators kowtow to the views of UK institutional investors when the traditionally influential cabal of UK pension funds and insurance companies that once dominated the market now only form a very small part of the equity markets in the UK.[213] The market is currently dominated by foreign institutions which,

[210] See text accompanying note 103 above.

[211] A. Gurrea, "Theory, Evidence, and Policy on Dual-class Shares: A Country-specific Response to a Global Debate" (2021) 22 E.B.O.R. 475, 490–91; J. Coffee, "Liquidity Versus Control: The Institutional Investor as a Corporate Monitor" (1991) 91 Colum. L. Rev. 1277, 1310; W. Forbes and L. Hodgkinson, *Corporate Governance in the United Kingdom: Past, Present and Future* (London 2015), 16.

[212] Investor Forum, "Response".

[213] As of the end of 2018, UK pension funds and insurance companies only held 6.1 per cent of UK listed equities (Office for National Statistics, "Ownership of UK Quoted Shares: 2018" (2020), 1, 5, available at https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2018).

despite their public opposition, have, in practice, been open to investing in dual-class shares structures.[214] There are three main reasons for the outsized influence of UK institutional investors on UK capital markets policy. First, since the Cadbury Report of 1992,[215] shareholders have been given a central role in policing the corporate governance of listed companies. The UK CGC operates by prompting corporate disclosure so that informed shareholders can instigate changes in those companies if necessary, and recent regulatory measures have emphasised a desire for greater stewardship engagement by (especially UK) institutional investors with the management of companies in which they invest.[216] Giving founders greater scope to insulate themselves from public shareholders through the adoption of dual-class shares will hamper those regulatory efforts, and, equally, institutional investors will be concerned as to how they will be able to satisfy regulatory fiat for them to engage with investee companies more effectively if they do not possess the tools to ensure that their voices are heard.[217] Second, preserving regulatory and governance exceptionalism has contributed to the LSE achieving disproportionately lofty prominence and scale.[218] Developing a reputation for the highest standards of corporate governance and preservation of investor rights created a burgeoning market to which investors were attracted. The natural tendency is to continue with such an approach on the assumption that it will continue to reap similar rewards. Third, the very nature of the LSE's regulator, the FCA (which has, in one guise or another, had responsibility for the Listing Rules since 2000), can foster a conservative approach to reform. As an independent public body with a statutory foundation and a mission to protect consumers, prevent anti-competitive behaviour and protect the integrity of the UK's financial system,[219] the FCA is more likely to prioritise protecting against downside risk to public shareholders,[220] which will exacerbate its inclination to support the views of UK institutional investors, rather than support companies seeking to innovate, risk-take and disrupt.

However, it is surely time for a change in approach. It is natural for a national regulator to consider seriously the stances of domestic financial institutions, but when investors are becoming increasingly more global, regulators should also consider whether prioritising the views of investors forming a minority of the market is in the best long-term interests of the exchange or the wider economy. Taking stewardship first – although with dual-class shares the effectiveness of stewardship engagement by

[214] See note 190 above. As also evidenced by numerous successful US dual-class shares IPOs.
[215] *Report of the Committee on the Financial Aspects of Corporate Governance* (London 1992).
[216] E.g. see FRC, "The UK Stewardship Code 2020".
[217] Investor Forum, "Response".
[218] Ibid.
[219] See note 109 above.
[220] Cheffins, *Company Law*, 379.

institutional investors with company management will be tempered, even with one share, one vote companies, several structural, legal and commercial pressures exist that discourage institutional investors (especially passive investors that are increasingly forming a larger part of the market[221]) from engaging with corporate management on a company-by-company basis.[222] There has been significant scepticism that UK institutional investors do in fact engage effectively with one share, one vote companies,[223] and the regulators have begun to embrace a wider notion of stewardship moving beyond individual company engagement to stewarding systemic market-wide risks.[224] Given that there is sparse evidence that effective and widespread issuer-specific engagement is taking place even in one share, one vote companies, the ideal of stewardship should not be a decisive reason to overly constrain the use of dual-class shares structures. In relation to the desire to preserve the exceptionalism of the premium tier, it should be acknowledged that the shareholder rights governance mechanics that have been ingrained into the premium tier are reminiscent of an exchange built upon retail, manufacturing, financial and natural resource issuers. In an era where new economy companies, the businesses of which are not as simple to assess or observe as the previous "old economy" companies, are becoming more pervasive, an ideological focus on public shareholder rights could hinder rather than support the continued success of the LSE. Furthermore, the LSE is arguably facing greater competition from foreign exchanges than at any other time in its history. Whereas prior to leaving the EU, the UK could exert influence over EU regulations to drag the regulatory approaches of the exchanges of other Member States closer and closer to those of the premium tier, now the LSE is in more open competition with those exchanges. Although a "race-to-the-bottom" in terms of corporate governance would not be in the long-term interests of any economy, there needs to be a greater acknowledgement that the LSE is falling behind other exchanges when it comes to attracting new economy companies to IPO. Therefore, although investors should be protected from egregious exploitation, it may be time to appreciate that a compromise is necessary that sacrifices ideologically optimal shareholder rights in favour of a pragmatic regime that balances investor protection against encouraging innovation and entrepreneurship. Deliveroo and Wise are cases in point. The companies listed on the standard tier after the Review's publication, and implemented "genuine" dual-class shares structures that gave them more

[221] The Investment Association, *Investment Management in the UK 2019-2020: The Investment Association Annual Survey*, September 2020, 49.

[222] B. Reddy, "The Emperor's New Code? Time to Re-evaluate the Nature of Stewardship Engagement Under the UK's Stewardship Code" (2021) 84 M.L.R. 842, 854–61.

[223] E.g. J. Kingman, "Independent Review of the Financial Reporting Council" (2018), 1, 8, 46, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf.

[224] See e.g. FRC, "Stewardship Code", Principles 4, 7; Reddy, "Emperor's", 865–71.

flexibility than the Review's proposals for the premium tier, notwithstanding, in the case of Deliveroo, the company's possible intention to upgrade to the premium tier in the future. It would appear that the concerns in this article that the Review's proposals on dual-class shares do not cater for the needs of founders have a real-world basis. Exceptionalism may preserve the prestige of the premium tier, but "at what cost"? As the Review itself points out, "it makes no sense to have a theoretically perfect listing regime if in practice users increasingly choose other venues".[225]

Ultimately, though, the underlying purpose of the FCA, as the LSE's regulator, may need to be reviewed. As discussed above, in its current form, it is always more likely to prioritise protection against downside risk over promoting upside potential. By way of contrast, the NYSE, although under the oversight of the Securities and Exchange Commission (SEC), has, unlike the LSE, prima facie responsibility for its own listing rules,, which gives it greater scope to consider its commercial interests in attracting further issuers.[226] This author certainly does not advocate for the UK to take a completely ruthless approach to attracting issuers to the equity markets while throwing public shareholder rights under the bus. However, as iterated throughout, it is all about balance. Interestingly, Hong Kong and Singapore, as described in this article, have developed what could be considered to be fairly pragmatic positions on dual-class shares that venerate public shareholder rights, while recognising the twenty-first century aspirations of tech-company founders. It is no surprise that the Hong Kong and Singapore regulators wear two hats: as listed companies in their own rights (requiring them to consider their own competitive interests) and as regulators of the markets (under statute in the case of Hong Kong).[227] The reversion of the Main Market to a more self-regulatory approach (as it had in the period before 2000) may be a too drastic and regressive step for the UK to take (and itself creates potential conflicts of interest). However, a more forward-looking system could be developed if the mission of the FCA were re-evaluated to ensure that as well as protecting consumers and the UK financial system, it has more of a stake in the upside of UK companies, by also embracing responsibility for the growth, competitiveness and success of the UK markets and economy.[228]

225 Review, 2.

226 Although SEC approval is required for certain revisions to the NYSE's rules, infamously, when the SEC attempted to regulate dual-class shares structures in 1988 (pursuant to Code of Federal Regulations, Title 17, Chapter 2, Part 240 § 240.19c-4), it was struck down by the Court of Appeals for the District of Columbia as an example of the SEC exceeding its powers (*Business Roundtable v SEC*, 905 F.2d 406 (D.C. Cir. 1990)).

227 Huang et al., "(Re)introduction", 34; T. Arthur and P. Booth, *Does Britain Need a Financial Regulator* (London 2020), 50. Although the Hong Kong Stock Exchange is under the overall oversight of the Securities and Futures Commission (SFC), like the NYSE, it is able to promulgate its own listing requirements (subject to final approval by the SFC).

228 Ironically, given the Review's conservative approach to dual-class shares, it also made a similar plea (Review, 18).

X. Conclusion

Although a few steps behind other major exchanges, the UK's premium tier has finally commenced climbing the hill towards an acceptance of dual-class shares, with a view to attracting innovative, high-growth companies to the market. Unlike the US though, where dual-class shares structures are subject to very few regulatory constraints, the regulatory environment of the UK and the prominence of UK institutional investors, who are generally hostile to dual-class shares, will inevitably result in the use of dual-class shares structures on the premium tier being conditional upon the adoption of measures that protect public shareholders. Such protective measures are not necessarily undesirable, and, indeed, many exchanges, such as Hong Kong, Singapore, Tokyo, Shanghai and India also mandate investor protections in this regard. However, a balance must be maintained that reduces the risks that the interests of public shareholders will be excessively expropriated, while not blunting the very benefits of dual-class shares that attract founders to adopt the structure and list on the public markets. A premium tier package has been suggested in this article that combines two features. First, focused event-driven sunset clauses that convert enhanced-voting into one share, one vote shares upon the occurrence of events that could increase the risks that the interests of the public shareholders will be impaired: specifically, upon the holder ceasing to be a director, transferring the enhanced-voting shares, or ceasing to own sufficient "skin-in-the-game". Second, provisions that protect against abuse of dual-class shares *ab initio*: specifically, ensuring that a separate public shareholder vote is required to effect certain corporate actions that could potentially be used to harm public shareholder interests. The possibility of granting public shareholders more robust independent director appointment rights has also been proposed.[229]

The package that has been proposed in this article deviates though from the Review's curious curate's egg of a package for premium tier dual-class shares structures. The Review's proposals, when factoring in the conditions attached, do not represent "genuine" dual-class shares and amount to little more than, effectively, a five-year, takeover-blocking golden share and a five-year guaranteed founder board seat. Although the premium tier rules on dual-class shares are likely to evolve and shift over many years, the FCA must fundamentally accept the reasons for founders adopting dual-class shares structures, otherwise any initiatives to introduce "dual-class shares-lite" will not spawn the flood of high-growth, innovative, early-stage IPOs envisaged. Such companies have numerous other options, ranging from dual-class shares listings on foreign exchanges and lucrative buy-outs

[229] For a comprehensive regulatory package towards the adoption of "genuine" dual-class shares structures on the premium tier, see Reddy, *Founders*, ch. 9.

by larger companies, to exploitation of the rich availability of private capital.

Why, though, may the UK risk the worst of both worlds, that is, relaxation of the high corporate governance standards of the premium tier without any meaningful upside in attracting listings? The answer lies in the nature of the FCA as regulator of the LSE. With its mission to protect consumers and the financial markets, the FCA will be primarily focused on ensuring that listed company controversies do not occur, thus protecting against the downside rather than promoting the upside. Such an approach also bolsters the outsized influence that UK institutional shareholders, who have been antagonistic to dual-class shares, have enjoyed for decades. It is not a surprise, therefore, that shareholder rights take priority to attracting high-growth, founder-led companies to the premium tier. However, if the UK continues to disproportionately favour the views of UK institutional investors, it will potentially move in a different direction to the other major global exchanges where dual-class shares structures are being welcomed more openly. A balance needs to be struck, which may require a review of the FCA's raison d'être, with perhaps a shift to the regulator bearing some accountability for the health, competitiveness and success of the UK economy alongside its watchdog role in protecting consumers and the integrity of the financial markets. With respect to dual-class shares, without that right balance, even as the UK climbs the steep hill towards dual-class shares acceptance, it could fall right back down again.