

Some Reflections on the Self-insider and the Market Abuse Regulation – The Self-insider as a Monopoly-Square Insider

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Free University of Bozen/Bolzano, CRELE and
ECGI

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A very preliminary version of this article was presented at the Insider Trading Conference organized at the Faculty of Economics and Management of the Free University of Bozen-Bolzano on October 25-26, 2019. I thank all the participants for the useful discussion. For comments and help on this article, I thank Peter Agstner, Sergio Gilotta, Paolo Giudici, Chiara Mosca, Federico M. Mucciarelli, Alain Pietrancosta. I remain the sole responsible for any error or mistake.

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Abstract

This article deals with the self-insider, i.e. the possible creation of the inside information by a person and its (abusive) exploitation. It describes the situation in Italy and Germany and then provides a taxonomy of the several cases of self-insider. The article then analyzes the case law of the ECJ and the MAR regulatory provisions for justifying/neglecting the existence of the self-insider (Article 9.5 and 9.6 MAR). Given the unclear regulatory answer regarding its sanctionability, the article proposes, based on the economics of MAR, a law and economics reason of why the self-insider sometime should be sanctioned, by describing it as a peculiar monopolistic behavior able to distort investors' confidence and market integrity. Finally, the article suggests that the European legislator should explicitly deal with the problem.

Keywords: Market Abuse Regulation, MAR, insider dealing, insider trading, self-insider, selfinsider, inside information, insider of itself, insider di se stesso; selbstgeschaffene innere Tatsachen, takeover, takeover for delisting

JEL Classifications: G38, K22

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Some Reflections on the Self-insider and the Market Abuse Regulation –

The Self-insider as a Monopoly-Square Insider

Stefano Lombardo*

Abstract: *This article deals with the self-insider, i.e. the possible creation of the inside information by a person and its (abusive) exploitation. It describes the situation in Italy and Germany and then provides a taxonomy of the several cases of self-insider. The article then analyzes the case law of the ECJ and the MAR regulatory provisions for justifying/neglecting the existence of the self-insider (Article 9.5 and 9.6 MAR). Given the unclear regulatory answer regarding its sanctionability, the article proposes, based on the economics of MAR, a law and economics reason of why the self-insider sometime should be sanctioned, by describing it as a peculiar monopolistic behavior able to distort investors' confidence and market integrity. Finally, the article suggests that the European legislator should explicitly deal with the problem.*

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1. Introduction

This article deals with the problem of the self-insider (or insider of itself)¹ in the Market Abuse Regulation (MAR) and the Market Abuse Directive 2 (MAD2, or CRIMMAD).² The overall aim of MAR is to protect market integrity and public confidence in order to promote investor protection,³ which are considered to be threatened and undermined by marked manipulation and insider trading. Repression of market abuse is (publicly and privately) enforced by a complex

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¹ The English expression *insider of itself* is in A. TRIPODI, 2012, *Informazioni privilegiate e statuto penale del mercato finanziario*, Padova, 282, fn. 3 as used by B. RIDER, K. ALENANDER and L. LINKLATER, 2002, *Market Abuse and Insider Dealing*, London, 14. The French expression reported by Tripodi is *initi  de soim me* as used by P. CONTE, *Bourses de valeurs*, in *Juris-Classeur P nal, Lois P nales annexes*, Paris, 200?, 3.

² Respectively, Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, L 173/1 12.6.2014; Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), L 173/179 12.6.2014. On MAR, see M. VENTORUZZO and S. MOCK, 2017, *Market Abuse Regulation*, Oxford. On insider trading, also from a comparative US perspective, see in general, M. VENTORUZZO, 2017, *The Concept of Insider Dealing*, in VENTORUZZO and MOCK, *cit.*, pp. 13.

³ Recital 2 MAR and Article 1 MAR refer to market integrity and investor confidence to enhance investor protection. From a criminal law perspective, market integrity and public/investor confidence are also typically identified as the protected interest (*bene giuridico tutelato/Schutzgut*) by insider trading regulation, see TRIPODI, *cit.*, 71 and E. HILGENDORF and C. KUSCHE, 2020, *Kap. 7.1. Vorbemerkungen zu Insiderdelikten*, in T. PARK (hrsg.), *Kapitalmarktstrafrecht*, 647, Rn. 17 and *Kap. 7: Insiderdelikte*, 718, Rn.1. On market integrity in the context of market abuses, H. McVEA, 2015, *Supporting Market Integrity*, in E. FERRAN, N. MOLONEY and J. PAYNE (ed.), *The Oxford Handbook on Financial Regulation*, Oxford, pp. 631. More in general and on a comparative perspective, J. AUSTIN, 2017, *What Exactly Is Market Integrity: An Analysis of One of the Core Objectives of Securities Regulation*, in *William & Mary Business Law Review*, pp. 2015; see also J. K NDGEN, 2008, *Effizienzorientierung im Kapitalmarktrecht*, in H. FLEISCHER and D. ZIMMER (Hrsg.), *Effizienz als Regelungsziel im Handels- und Wirtschaftsrecht*, Frankfurt am Main, pp. 100, 110. On investor confidence, see K. JEREMYKO, 2017, *Economics Note: Investor Confidence*, available under www.sec.gov.

system of criminal and administrative sanctions and measures, as well as civil remedies, as provided (differently) for by the single Member States.⁴

According to Article 7.1(a) MAR inside information has four characteristics.⁵ Given the definitions and the prohibitions of insider dealing and of unlawful disclosure of inside information (Articles 8, 10 and 14 MAR),⁶ the self-insider is a particular type of insider. She/he is the person that has autonomously produced the inside information and uses this inside information for trading in financial instruments. In other words, the self-insider is the original creator of the inside information. She/he takes a decision which is material and uses this decision/inside information to practice insider trading.⁷

The self-insider is called in Italy *insider di sé stesso*.⁸ Recently it has been the object of one important jurisprudential case (*Cremonini*), which culminated with a decision of the *Cassazione*

⁴ I will not cover in this article the complex issue related to enforcement and sanctions of market abuses (MAR and MAD2), on which see (to limit the literature in English) in general, V.D. TOUNTOPOULOS, 2014, *Market Abuse and Private Enforcement*, in *European Company and Financial Law Review*, pp. 297; S. COOLS, 2017, *Public Enforcement of the Market Abuse Regulation*, in VENTORUZZO and MOCK, *cit.*, pp. 63; D. BUSCH, *Private Enforcement of the Market Abuse Regulation in European Law*, in VENTORUZZO and MOCK, *cit.*, pp. 85; A. PERRONE, *EU Market Abuse Regulation: The Puzzle of Enforcement*, in *European Business Organization Law Review*, online article version. In general, on transparency and enforcement, see also J.A. KÄMMERER, 2019, *Transparency: Public Enforcement Strategies*, in V. TOUNTOPOULOS and R. VEIL, *Transparency of Stock Corporations in Europe*, London, pp. 285; P. GIUDICI, 2019, *Private Enforcement of Transparency*, in TOUNTOPOULOS and VEIL, *cit.*, pp. 311.

⁵ The information (i) is of a precise nature; (ii) has not been made public; (iii) is relating, directly or indirectly, to one or more issuers or to one or more financial instruments; (iv) which, if made public, would be likely to have a significant effect on the price of those financial instruments. On the MAR notion of inside information, see M. VENTORUZZO and C. PICCIAU, 2017, *Article 7: Inside information*, in VENTORUZZO and MOCK, *cit.*, pp. 175.

⁶ On Article 8 MAR (insider dealing) see J.L. HANSEN, 2017, *Article 8: Insider dealing*, in VENTORUZZO and MOCK, *cit.*, pp. 208; on Article 10 (unlawful disclosure of inside information) see C. MOSCA, *Article 10: Unlawful disclosure of inside information*, in VENTORUZZO and MOCK, *cit.*, pp. 275; on Article 14 (prohibition of insider dealing and of unlawful disclosure of inside information, see J.L. HANSEN, 2017, *Article 14: Prohibition of insider dealing and of unlawful disclosure of inside information*, in VENTORUZZO and MOCK, *cit.*, pp. 326.

⁷ I use the term 'material' as synonymous for precise information, on which see VENTORUZZO and PICCIAU, *cit.*, pp. 189. Furthermore, I use the term 'insider trading' not technically to include insider dealing (Article 8 MAR) and unlawful disclosure of inside information (Article 10 MAR).

⁸ The debate on the self-insider in Italy started already 30 years ago, see F. CARBONETTI, 1989, *Acquisto di azioni proprie e <<insider trading>>*, in *Rivista delle società*, pp. 1009; F. GRANDE STEVENS, *Questioni in tema di insider trading e di compravendita di azioni proprie*, in *Rivista delle società*, pp. 1006; F. GALGANO, 1992, *Gruppi di società, insider trading, OPA obbligatoria*, in *Contratto e impresa*, pp. 637; P. ABBADESSA, 1992, *L'insider trading nel diritto privato italiano: prima e dopo la legge n. 157/1991*, in *Banca, borsa, titoli di credito*, pp. 1/749, 750, fn. 3; L. DI BRINA, 1992, *Il Divieto*

civile (the Italian Supreme Court) in October 2017.⁹ This decision has recognized the presence of the self-insider in a case of takeover for delisting.¹⁰ In Germany, the problem related to the self-insider has been traditionally qualified with the terms *selbstgeschaffene innere Tatsachen* (*self-created internal facts/circumstances*)¹¹ but there has been no enforcement and case law.¹² In a

di insider trading, in C. RABITTI BEDOGNI, *Il dovere di riservatezza nel mercato finanziario*, pp. 425, 449; G. DE FICCHY, 1995, *La Società insider*, in *Rivista delle società*, pp. 600. More recently, see A. TRIPODI, *cit.*, pp. 281; A. MORELLO, 2013, *L'insider che crea e utilizza l'informazione privilegiata: uso o abuso?*, in *Rivista di diritto bancario*, pp. 13; S. GILOTTA, 2019, *Riflessioni sull'insider di se stesso*, in *Le Nuove Leggi Civili Commentate*, pp. 395; for a more complete overview of the Italian literature on the topic, see F. RAFFAELE, 2019, *Ritorno al futuro 3: L'insider di se stesso all'esame della Cassazione e il nuovo tentativo di ipotizzare il market egalitarianism*, in *Giurisprudenza commerciale*, pp. 778/II, fn. 1.

⁹ This jurisprudential case refers to several steps with the involvement of several courts at several judicial levels, because of the Italian system of double sanctions (administrative and criminal) in the case of insider trading (and market manipulation). See TAR Lazio (the only decision in the series of the *Cremonini* case denying the existence of the self-insider), Rome, 10 July 2012, n. 6257 in *Società*, 2013, pp. 47, with note by S. LOMBARDO, *OPA, informazione privilegiata e insider di se stessi*, pp. 50 and also in *Banca borsa titoli di credito*, 2014, pp. II/95, with note by A. LAUDONIO, *Rastrellamento di azioni, delisting ed il fantasma dell'insider di se stesso*, pp. 99/II; Corte d'Appello di Bologna, 29 October 2013, in *Giurisprudenza commerciale*, 2015, pp. 564/II, with note by E. RECCIA, *"Insider" di se stesso e la distinzione tra o.p.a per la scalata e o.p.a per il "delisting"*, pp. 568/II; Cassazione Civile, Sez. II, n. 24310, 16 October 2017, in *Giurisprudenza commerciale*, 2018, pp. 659/II with a note by S. LOMBARDO, *L'insider di se stesso alla luce della decisione della Corte di Cassazione (civile)*, pp. 666/II, followed in the same journal by F. CADORIN, 2019, *OPA per il delisting fra insider di se stesso ed efficienza del mercato*, 105/II; F. RAFFAELE, *cit.*; M. VENTORUZZO, 2018, *Qualche nota sul cosiddetto "insider di sé stesso" alla luce del Regolamento UE sugli abusi di mercato*, in *Società*, pp. 745; A. BARTALENA, 2018, *O.p.a. per delisting e insider trading: brevi riflessioni sull'insider di se stesso*, in *Banca borsa e titoli di credito*, pp. II/698; Tribunale di Milano, Sez. III pen., n. 12149, 5 febbraio 2016, in *Società*, pp. 1272 with a note by S. CONFALONIERI, *I rischi di insider trading nelle fasi propedeutiche all'o.p.a: problemi e prospettive*, pp. 1278; Corte d'Appello di Milano, Sez. II, 15 gennaio 2019, N. 284, in DPC, <https://archiviodpc.dirittopenaleuomo.org>, with a note by C. PAGELLA, 2019, *Riflessi applicativi del principio di proporzione del trattamento sanzionatorio complessivo irrogato per fatti di market abuse e punibilità dell'insider di sé stesso: la Corte d'Appello di Milano sul caso Cremonini*.

¹⁰ TRIPODI, *cit.*, 303 and 315, reports another Italian suspect case of self-insider: the *Unipol* case that had several degrees but ended in 2012 with the recognition of the non-existence of inside information, 318. The case regarded the insurer Unipol that in fact bought on the market its bond securities before publicly announcing their anticipated reimbursement.

¹¹ Referring to the old wording of the German insider trading regime that replaced the word *information* with the word *Tatsache* (*fact/circumstance*). Contrary to Italy, where the reference has traditionally been to the subject (the self-insider), the reference in Germany has been to the object (i.e. to the *self-created internal facts/circumstances*). See A. CAHN, 1998, *Grenzen des Markt- und Anlegerschutzes durch das WpHG*, in *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*, pp. 1; H.-D. ASSMANN, 1999, § 13, in H.-D. ASSMANN and U.H. SCHNEIDER (hrsg.), *Wertpapierhandelsgesetz*, Köln, Rn. 32.

¹² See e.g. P.R. MENNIKE and N. JAKOVOU, 2009, § 13, in A. FUCHS, *Wertpapierhandelsgesetz*, München, Rn. 57-59, and in particular for more literature fn. 125.

famous decision of 2003 the *Bundesgerichtshof* (the German Supreme Court) decided that the *selbstgeschaffene innere Tatsachen* are not inside information, so neglecting the possibility of the self-insider.¹³

Apart from the Italian and German (and French)¹⁴ specific experiences, the problem of the self-insider is a complex one because of the textual and teleological interpretative difficulties to reach a certain answer about its existence and sanctionability.

In the European Union, equal access to inside information to grant market integrity and investor confidence, was legitimized by the European Court of Justice (ECJ) as the core of the system already in 2005 in *Grongaard et Bang*.¹⁵ Given this paradigm of equal access, the problem of the self-insider is a critical one, both from a theoretical and practical perspective, because, as it has been prominently argued, taken “to its logical extreme, ... equal access would forbid traders from trading on the basis of their own intentions”.¹⁶

The United States has historically refused, through the Supreme Court case law, the equal access paradigm.¹⁷ The proprietary theory of inside information (as fiduciary theory and

¹³ BGH, 06.11.2003 – 1 StR 24/03, in *Zeitschrift für Wirtschaftsrecht* 2003, pp. 235.

¹⁴ For a reference to this “paradoxical figure” and for a French case of self-insider in 1994 in a stake-building by a potential bidder functional to launch the offer (*Zodiac* case), see A. PIETRANCOSTA, 2019, *Brief remarks on the necessary clarification of market abuse prohibitions in times of shareholder activism*, in *Revue Trimestrielle de Droit Financier*, pp. 3, 6 and 10.

¹⁵ Case C-384/02 of 22 November 2005, point 33. See in general J.L. HANSEN, 2017, *Market Abuse Case Law - Where Do We Stand With MAR?*, in *European Company and Financial Law Review*, pp. 367. In Europe this principle was already elaborated by the Report of a Group of Experts appointed by the EEC Commission, 1966, *The Development of a European Capital Markets*, where it is stated at p. 249. In the USA the equal access perspective is typically referred to as stated by the Securities and Exchange Commission in SEC, 1961, *Matter of Cady, Roberts & Co.*, accepted by the Second Circuit in *SEC v Texas Gulf Sulphur Co* in 1968 but refused by the Supreme Court in *Chiarella* in 1980, for an historical review see J. D. COX, 2018, *Seeking an Objective For Regulating Insider Trading through Texas Gulf Sulphur*, in *Southern Methodist University Law Review*, pp. 697; VENTORUZZO, *Comparing, cit.*

¹⁶ S.M. BAINBRIDGE, 2013, *Regulating insider trading in the post-fiduciary duty era: equal access or property rights?*, in S.M. BAINBRIDGE (ed.), *Research Handbook on Insider Trading*, Cheltenham, pp. 80, 91.

¹⁷ For a comparison between the US and EU regulatory philosophies of insider trading, see E. GREENE and O. SCHMID, 2013, *Duty Free Insider Trading?*, in *Columbia Business Law Review*, pp. 369; M. VENTORUZZO, 2014, *Comparing Insider Trading in the United States and in the European Union: History and Recent Developments*, in *European Company and Financial Law Review*, pp. 554; S. GILOTTA, *The Regulation of Outsider Trading in the EU and the US*, in *European*

misappropriation theory), which involves a breach of a fiduciary duty to the owner of the material information, is the US paradigm.¹⁸ This proprietary theory is difficult to apply to the self-insider, because everyone is the natural owner of his/her own decisions. The practical consequence is the irrelevance of the problem.¹⁹ An early and very prominent advocate of the equal access paradigm recognized the asymmetry of information between a self-insider using his decision and the market, as an unerodable advantage but recognized at the same time the impossibility to impede transactions for this reason.²⁰

Company and Financial Law Review, pp. 631; F.A. GEVURZT, 2018, *The Road Not Taken: Comparison of the E.U. and U.S. Insider Trading Prohibitions*, in *Washington University Journal of Law Policy*, pp. 31.

¹⁸ Proprietary in terms of allocating property rights on the information. As explained by Prof. Kraakaman, under the fiduciary theory “Rule 10-b5 bars trading on non-public information when an insider owes a disclosure duty based on a ‘pre-existing relationship of trust and confidence’ ... to uninformed traders. The effect is to conform the law of insider trading to the paradigm of common law fraud in which a disclosure duty can only arise from a fiduciary relationship”, R. KRAAKMAN, 1991, *The Legal Theory of Insider Trading Regulation in the United States*, in K.J. HOPT and E. WYMEERSCH, *European Insider Dealing – Law and Practice*, London, pp. 39, 42, while under the misappropriation theory (44) “any trading on non-public information acquired by theft or breach of a duty of confidentiality violates Rule 10b-5”. Recently, the US Supreme Court decided *Salman*, a case related to the chain tipper-tippee liability, see C.W. MURDOCK, 2019, *The Future of Insider Trading after Salman: Perpetuation of a Flawed Analysis or a Return to Basics*, in *Hastings Law Journal*, pp. 1547. Furthermore, for the latest developments (regulatory and case law) from the US, see J.C. COFFEE JR., 2020, *The Blaszcak Bombshell: A Return to the “Parity of Information” Theory of Insider Trading?*, available under <https://clsbluesky.law.columbia.edu/2020/02/26/the-blaszcak-bombshell-are-we-returning-to-a-parity-of-information-theory-of-insider-trading/>.

¹⁹ Referring to the proprietary notion, this important point is made by PIETRANCOSTA, *cit.*, 10. For the possible case of the corporation as self-insider in a repurchase of its shares for the US system, see M.J. LOEWENSTEIN and W. K.S. WANG, 2005, *The Corporation as Insider Trader*, in *Delaware Journal of Corporation Law*, pp. 45. See also A. JR. FLEISCHER, R. H. MUNDHEIM and J.C.JR. MURPHY, 1973, *Initial Inquiry into the Responsibility to Disclose Market Information*, in *University of Pennsylvania Law Review*, 798, 840. In the context of insider trading and takeover regulation, in 1980 the US Supreme Court in *Chiarella* (445 U.S. 222, 1980) made indirectly the point (233) that there is a misuse of market information by a bidder to use its decision to perform a takeover in order to buy stock of the target company before public announcement of the offer but at the same time the legislator, balancing the several interests in order not to harm operation of the securities markets, limited with the Williams Act the possible purchases up to 5% of the target, so derogating from the rule of abusing the inside information of the decision to bid. The balancing philosophy between the Williams Act (providing the possibility for the bidder to exploit its decision/material information to perform a takeover and to buy shares up to 5% of the target before public announcement) and the insider trading regime is analyzed by FLEISCHER, MUNDHEIM and MURPHY, *cit.*, 809.

²⁰ See V. BRUDNEY, 1979, *Insiders, Outsiders, and Informational Advantages under the Federal Securities Laws*, in *Harvard Law Review*, pp. 322, 362: ... “But that advantage, unerodable though it be, is endemic to our exchange system, and no more validly requires disclosure to others than does the advantage of any negotiator who knows that he is willing to pay more or accept less than he has announced during the course of negotiations”.

To my knowledge, the only legal system that explicitly deals with the notion of self-insider is the Australian one.²¹ A short reference to the self-insider exists also in New Zealand for the public issuer as an insider of itself.²²

This article discusses the problem of the self-insider referring mainly to MAR but also to the IDD and MAD.²³ After a short description of Germany and Italy (Section 2), the article provides a taxonomy of the possible cases of self-insider (Section 3). Then it asks, on the basis of the case law of the ECJ and the textual and teleological interpretation of MAR (in particular Article 9.5 and 9.6 MAR), whether the self-insider is a behavior that exists or not and has to be sanctioned or not (Section 4). Given the unclear legal answer regarding sanctionability, the article, after sketching the economics of insider trading and the economics of MAR, analyzes the question from a law and economic perspective. It provides an economic argument in favor of the sanctionability of the self-insider based on its peculiar monopolistic position in the market. Indeed, the self-insider sometimes presents the characteristic of being a monopoly of the

²¹ See also L. KLÖHN, 2016, „Selbst geschaffene innere tatsachen“, *Scalping and Stakebuilding im neuen Marktmissbrauchtum*, in *Zeitschrift für Wirtschaftsrecht* (Beilage zu Heft 22), pp. 44, 465. The notion of information in the Corporation Act (1042A) includes also matters relating to the intentions or likely intentions of a person. This notion of information including also decisions taken by the self-insider (hence excluding the necessity of alterity of information), apparently is anchored in a system that, like the European one, valorizes and supports, equal access to inside information for investors, to grant investors' confidence and market integrity but where possession of inside information requires a mental element (actual knowledge/awareness). See J. OVERLAND, 2006, *There was Movement at the Station for the Word had Passed Around: How does a Company Possess Inside Information under Australian Insider Trading Laws?*, in *Macquarie Journal of Business Law*, pp. 241; K. KENDAL and G. WALKER, 2013, *Insider Trading in Australia*, in BAINBRIDGE, *Research, cit.*, pp. 365.

²² This resembles the Australian one and on which see G. WALKER and A.F. SIMPSON, *Insider trading law in New Zealand*, in BAINBRIDGE, *Research, cit.*, pp. 386, 397. Indeed, according to §8B of the Securities Markets Act 1988 inside information means the information in respect of which a person is an information insider of the public issuer in question while an information insider is defined by §8A: a person is an information insider of a public issuer if that person (1) (a) has material information relating to the public issuer that is not generally available to the market; and (b) knows or ought reasonably to know that the information is material information; and (c) knows or ought reasonably to know that the information is not generally available to the market. (2) A public issuer may be an information insider of itself.

²³ Respectively, Insider Dealing Directive (IDD), Directive 89/592/EEC, Council Directive of 13 November 1989 coordinating regulations on insider dealing, L 334/30, 18.11.89 on which see K.J. HOPT, 1990, *The European insider Dealing Directive*, in *Common Market Law Review*, pp. 51 and Market Abuse Directive (MAD), Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider trading and market manipulation (market abuse) L 96/16, 12.4.2003 on which see G.A. FERRARINI, 2004, *The European Market Abuse Directive*, in *Common Market Law Review*, pp. 711.

monopolistic use of an inside information, i.e. the self-insider is at times a monopoly-square insider (or monopoly² insider). The monopoly-square self-insider is then applied to the mentioned cases to analyze which of them can be sanctioned according to Article 9.6 MAR (Section 5). Finally, the article argues briefly that the European legislator in the possible MAR revision should explicitly deal with the problem of the self-insider, either prohibiting it or accepting it as a minor problem in the context of the equal access paradigm proper of the European regime (Section 6).²⁴

2. A short comparison between Germany and Italy

The German Supreme Court (*BGH*) stopped in 2003 the development of the self-insider in Germany.²⁵ The decision related to a case of scalping.²⁶ The possible inclusion of scalping in the realm of inside information and not in market manipulation, implied also the question of whether the behavior was based on the exploitation of an own decision (inside information), so activating the self-insider, and in the case of an affirmative answer of which decision.²⁷ The *BGH*

²⁴ The process for the revision of the MAR started with the publication of ESMA *Consultation paper 'MAR review report'*, 3 October 2019, ESMA70-156-1459 on the basis of Article 38 MAR.

²⁵ The legislative draft (*Gesetzentwurf*) of 1994 of the German government to the IDD in the explanation to §14 WpHG (*Verbot von Insidergeschäften*) excluded from its application the implementation of its own entrepreneurial decisions on the basis of the IDD Recitals: "Für die Auslegung des Begriffs des Ausnutzen sind insbesondere die Erwägungsgründe der Insider Richtlinie heranzuziehen. Danach ist in der Umsetzung einer eigenen unternehmerischen Entscheidung als solche kein Ausnutzen von Insiderwissen, sofern nicht die Entscheidung durch anderweitig erlangtes Insiderwissen beeinflusst ist", RegE, BT-Drucks. 12/6679, 47.

²⁶ Scalping was qualified as a behavior in which a person is able (i) to influence with a recommendation to buy the price of a financial instrument and (ii) to sell this financial instrument after the recommendation has caused a price increase; on scalping, see CAHN, *cit.*, 20. The *Opel* case, decided by the *BGH*, related to the time of validity of the IDD and referred to a journalist, who first acquired financial instruments, then recommended a buy order on those financial instruments to investors and then re-sold the financial instruments at a profit. On the Court decision see J. VOGEL, 2004, *Scalping als Kurs- und Marktpreismanipulation*, in *Neue Zeitschrift für Strafrecht*, pp. 252; H. FLEISCHER, 2004, *Scalping zwischen Insiderdelikt und Kursmanipulation*, in *Der Betrieb*, pp. 51. For the *Opel* case, on which see LG Stuttgart, 30.08.2002 see the note by M. LENENBACH, 2003, *Scalping: insiderdelikt oder Kursmanipulation*, in *Zeitschrift für Wirtschaftsrecht*, pp. 243. For another case of scalping, *Priors*, see H. PETERSEN, 1999, *Die Strafbarkeit des „Scalping“*, in *Wistra*, pp. 329; M. WEBER, 2000, *Scalping – Erfindung und Folgen eines Insiderdelikts*, in *Neue Juristische Wochenschrift*, pp. 562.

²⁷ See e.g. PETERSEN, *cit.*, 328. For the same relation between scalping and self-insider, in Italy see TRIPODI, *cit.*, 286. The self-created information (*innere Tatsache*) to be exploited has been identified by a Court (LG Stuttgart) in the *Opel* case with the intention to buy financial instruments in order to sell them after the recommendation to investors to buy them, with the implicit assumption that an inside information does not require alterity between persons, i.e.

qualified scalping as a form of market manipulation and not of insider trading. Furthermore, the Court also qualified the nature of inside information. The Court, based on the notion of inside information of the IDD, declared that an information, *eine Tatsache* (§13 WpHG) needs as a prerequisite a relation with a third party (*Drittbezug*) so that, by definition, it is not possible to have an inside information created by the self-insider.²⁸ In other words, alterity between at least two persons is a necessary prerequisite for inside information. This solution has developed as the standard for the notion of inside information in Germany. Legal doctrine has basically accepted the solution proposed by the German Supreme Court.²⁹ Only in recent times, have some scholars opened the door to the possible inclusion of the self-insider in the inside information regulatory regime based on the developments of European case law and the MAR.³⁰

In Italy, the recent *Cremonini* case has legitimated the existence and sanctionability of the self-insider. Briefly, Mr. Cremonini, major shareholder of a group of companies active in the food industry, decided at the beginning of 2008 to delist a listed company (Cremonini spa, of which he was majority shareholder and president). Before announcing the takeover for delisting, Mr. Cremonini started, through a newly created company, to buy shares of Cremonini spa at a price

transmission of knowledge between at least two parties. Indeed, according to the LG Stuttgart: „Insidertatsache ist im vorliegenden Fall die Absicht des Angeklagten O., Insiderpapiere, also Aktien, privat zu erwerben und diese zeitnah an die von ihm betreuten Aktienfonds zum Kauf zu empfehlen, um aus hierdurch entstehenden Kurssteigerungen kurzfristig Gewinne zu erzielen. Diese Absicht war nicht öffentlich bekannt. Die Kammer ist der Ansicht, dass der Begriff der „Insidertatsache“ im WpHG dahin gehend auszulegen ist, dass er auch Absichten (innere Tatsachen) umfasst ... Denn die Absicht als solche ist wertungsfrei als innerer Zustand grundsätzlich beweisbar und stellt damit eine „Tatsache“ dar.“, by LENBACH, *cit.*, 261.

²⁸ The Court cited WEBER, *cit.*, and stated: eine „Information“ regelmäßig einen Drittbezug aufweist ... Eine Verwendung des Begriffs der Information in dem Sinne, daß eine Person sich über einen von ihr selbst gefaßten Gedanken „informiert“, ist dem Sprachgebrauch fremd. Die Gesetzesmaterialien bieten keinen Anhalt dafür, daß der deutsche Gesetzgeber bei der Umsetzung der Richtlinie mit der Verwendung des Begriffs der Tatsache anstelle des Begriffs der Information bewußt von der Richtlinie abweichen wollte und von einem anderen Verständnis ausging».

²⁹ For some commentaries, see e.g. P.R. MENNICKE and N. JAKOVOU, 2009, § 13 WpHG, in A. FUCHS (hrsg.), *Wertpapierhandelsgesetz (WpHG) Kommentar*, München, Rn. 59; C. RITZ, 2015, § 13 WpHG, in C. JUST, T. VOß, C. RITZ and R. BECKER (hrsg.), *Wertpapierhandelsgesetz (WpHG) Kommentar*, München, Rn. 273.

³⁰ See P.R. MENNICKE and N. JAKOVOU, 2016, § 13 WpHG, in A. FUCHS (hrsg.), *Wertpapierhandelsgesetz (WpHG) Kommentar*, München, Rn. 59; KLÖHN, *cit.*; H.-D. ASSMANN, 2019, Art. 7 Vo Nr. 596/2014, in H.-D. ASSMANN, H.H. SCHNEIDER and P.O. MÜLBERT (hrsg.), *Wertpapierhandelsrecht*, Rn. 17 but see already H.-D. ASSMANN, 2012, § 13, in H.-D. ASSMANN et al. (hrsg.), *WpHG*, Köln, Rn. 10; on the criminal law perspective, see E. HILGENDORF and C. Kusche, Art. 7 MAR, in T. PARK (hrsg.), *Kapitalmarktstrafrecht*, Rn. 41.

lower than the one decided for the delisting.³¹ Consob sanctioned him for insider trading.³² After several lower court decisions, the *Cassazione civile* decided for the presence of insider trading as self-insider: Mr. Cremonini exploited his decision to delist Cremonini spa with pre-bid acquisitions of shares. In a nutshell, the Court recognized the presence of the self-insider in this takeover for delisting context but did not distinguish between takeovers for delisting from normal takeovers. The Court largely argued using the ECJ decision on *Spector*,³³ also refusing to ask a possible preliminary question to the ECJ to clarify the issue from a European perspective.³⁴

3. The several cases of the self-insider

Starting with the IDD, legal scholarship has identified several possible cases of the self-insider, i.e. the creation of inside information by a decision of a person and its exploitation with

³¹ The average price was 2.27€ against 3€ for the takeover.

³² Consob: *Commissione Nazionale per le Società e la Borsa* is the securities regulation authority and is competent for administrative sanctions given the double sanctions system typical of Italy; on which see M. VENTORUZZO, 2015, *When market abuse rules violate human rights: Grande Stevens v. Italy and the different approaches to double jeopardy in Europe and the US*, in *European Business Organization Law Review*, pp. 145. Consob, decision N. 17777, 11 May 2011, available on the homepage of Consob.

³³ Case C-45/08, of 23 December 2009. Briefly, in *Spector* the ECJ introduced a standard of presumption in the use of inside information (see Section 4.1). On *Spector*, see L. KLÖHN, 2010, *The European Insider Trading Regulation after Spector Photo Group*, in *European Company and Financial Law Review*, pp. 347; K. LANGENBUCHER, 2010, *The 'use or possession' debate revisited – Spector Photo Group and insider trading in Europe*, in *Capital Markets Law Journal*, pp. 452; M. BÖSE, 2011, *Note*, in *Common Market Law Review*, pp. 189; M. KINANDER, 2019, *Ten years after: the Spector presumption in MAD, MAR and MADII*, in *Capital Markets Law Journal*, pp. 364.

³⁴ The points can be summarized as follows: (i) information does not require alterity in the MAD context, i.e. it does not necessarily require exchange of information between at least two parties: information is just knowledge; (ii) since Mr. Cremonini was the *dominus* of the involved companies, he decided the delisting project (he was primary insider); (iii) recital 30 MAD includes the operations after the decision to bid is public but not the operations before the bid is public (this is confirmed also in MAR); (iv) *Spector* includes a presumption of use, because the rationale of MAD/MAR is to protect investors' confidence and market integrity; (v) there is a difference between takeover for delisting and normal takeover (but the Court did not explore and explain the difference); (vi) in the takeover for delisting the major shareholder exploits his inside information to bid to buy shares at a discounted price; (vii) *Spector* can be used in this case and there is no necessity to ask the ECJ for a preliminary ruling; (viii) investors' confidence and market integrity based on equal access justify the application of the *Spector* presumption to this case. With respect to the decision of the *Cassazione*, in favor of the existence of the self-insider, see LOMBARDO, *L'insider di se stesso*, *cit.*; BARTALENA, *cit.*; against RAFFAELE, *cit.*; VENTORUZZO, *Qualche nota*, *cit.*, M. MAUGERI, 2018, *Offerta pubblica di acquisto e Informazioni privilegiate*, in *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, pp. 267.

trading activity by this person.³⁵ A brief description of each case is necessary to identify their characteristics.³⁶

The first case is the issuer as self-insider.³⁷ Legal doctrine has identified the major problem of the self-insider issuer for share repurchases.³⁸ In this case, there are actually two kinds of different and conceptually autonomous types of inside information to be considered:³⁹ (i) the specific decision of the issuer to buy its own shares, which can be price-sensitive, being so material information, and (ii) the possible inside information that is not public and motivates the issuer to buy its own shares.⁴⁰ The first case is inside information only in hypothetical cases. Indeed, according to Article 60 of Directive 2017/1132/EU,⁴¹ the practical procedure of company law (and securities regulation) requires that the shareholders' meeting empowers the administrative body to buy the shares on the market, by specifying the conditions, so that every step of this procedure is subject to proper disclosure.⁴² Nevertheless, from the perspective of

³⁵ For the enumeration, see also GILOTTA, *Riflessioni*, *cit.*.

³⁶ In this enumeration, I do not consider the case of a judge, who has to take a decision about a case and exploits his decision to trade before the decision is made public. For this behavior, see TRIPODI, *cit.*, 286; see also C. SCHRÖDER, 2009, *Der Richter als Insider*, in M. HABERSACK, H.-H. JOERS and A. KRÄMER (hrsg.), *FS Gerd Nobbe*, Köln, pp. 755.

³⁷ As already mentioned, New Zealand law explicitly includes the issuer by stating that a public issuer may be an insider of itself.

³⁸ See e.g. CARBONETTI, *cit.*; GRANDE STEVENS, *cit.*; DI BRINA, *cit.*; LOEVENSTEIN and WANG, *cit.*.

³⁹ On the distinction, see DE FICCHY, *cit.*, 605; see also RAFFAELE, *cit.*, 786/II, fn. 28. For the distinction see also FLEISCHER, MUNDHEIM and MURPHY, *cit.*, 840. On the contrary, LOEVENSTEIN and WANG, *cit.*, refer the issue for the US more on whether the decision to buy is based on inside information and not to the decision in itself: 46, if "such a purchase is based on material, nonpublic information, the question arises whether the corporation, qua corporation, as violated rule 10b-5 or some other applicable law. Most commentators who have considered the issue have concluded that the corporation does violate rule 10b-5". See GILOTTA, *Riflessioni*, *cit.*, 408, for the case of the issuer which buys own shares on the basis of inside information related to the knowledge of own future projects.

⁴⁰ It can be debated whether this possibility is admissible, but the topic is not relevant here.

⁴¹ Directive 2017/1132/EU of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, L 169/46 30.6.2017.

⁴² So for instance in Italy, the interplay between Article 2357 Civil Code integrated with article 132 Consolidated Financial Act (TUF). The extent to which proper disclosure is granted in order to avoid a possible inside information on the decision to buy own shares and the effective purchase of them can be problematized. For instance, one could argue the shareholder's meeting provides only very general conditions to be concretized by the administrative body

analysis of this article only the first case is a proper case of self-insider (i.e. where the decision/inside information to buy is the actual issue because material of itself)⁴³ even if, admittedly, in reality the two types are (possibly) combined in the majority of cases of share repurchases.

The case of the issuer share repurchase has generally been considered as permitted during the time period of the IDD on the basis of Recital 11⁴⁴ and then regulated in Article 8 MAD. Currently, it is regulated in Article 5 MAR together with the stabilization activity.⁴⁵ Article 5 MAR works as a safe harbour and protects the issuer share-repurchases activity covering possibly both case (i) and case (ii).⁴⁶

The second case of the possible existence of the self-insider relates to another very important piece of European capital market regulation, i.e. the takeover decision.⁴⁷ The decision to promote a takeover bid has important consequences not only on the price of the target, but also of the bidder, if listed. For this reason, this decision presents the characteristic of inside information.⁴⁸ The possibility to exploit the already-taken decision to bid, in order to accumulate

or the exemption of Article 60.2 takes place (absence of shareholders' meeting decision because of imminent danger for the company).

⁴³ One could also take into consideration the case of the members of the administrative body who trade the shares before asking the shareholders' meeting the decision for the company to buy the shares.

⁴⁴ See DE FICCHY, *cit.*, 606; Recital 11 IDD red: *Whereas, since the acquisition or disposal of transferable securities necessarily involves a prior decision to acquire or to dispose taken by the person who undertakes one or other of these operations, the carrying-out of this acquisition or disposal does not constitute in itself the use of inside information.*

⁴⁵ On Article 5 MAR, see S. MOCK, 2017, *Article 5: Exemption for buy-back programmes and stabilization*, VENTORUZZO and MOCK, *cit.*, 154. The stabilization activity was covered in Recital 12 IDD. On stabilization, see D. BOREIKO and S. LOMBARDO, 2011, *Stabilization Activity in Italian IPOs*, in *European Business Organization Law Review*, pp. 437.

⁴⁶ In general, on share repurchases, see M. SIEMS and A. DE CESARI, 2012, *The Law and Finance of Share Repurchases in Europe*, in *Journal of Corporate Law Studies*, pp. 33.

⁴⁷ GALGANO, *cit.*; HOPT, *cit.*, 60; CAHN, *cit.*, 19. The issue related to the importance of the takeover decision as possible insider trading decision is also discussed by P.L. DAVIES, 1991, *The Take-over Bidder Exemption and the Policy of Disclosure*, in HOPT and WYMEERSCH, *cit.*, pp. 243. For the US FLEISCHER, MUNDHEIM and MURPHY, *cit.*, 809.

⁴⁸ A subcase of the takeover case is the takeover for delisting, i.e. the one of the *Cremonini* case. In this case, the major shareholder of the listed company (that could also be a listed company) decides the delisting but before

shares before reaching an adequate quota of the target to make the decision public is considered to be an essential tool to reach the objective.⁴⁹

During the IDD, the relationship between inside information and takeover was supposed to be regulated by Recital 11 IDD,⁵⁰ and the bidder's stake-building activity was considered functional to the takeover and permitted.⁵¹ MAD referred to takeover in Recitals 28 and 29, while the takeover directive (TOD) stated in Recital 12 a general prohibition against insider dealing in the context of the disclosure of *information concerning bids* (Article 6 TOD) and *disclosure of the bid decision* (Article 8 TOD).⁵² With the MAR, the regulatory regime is more uniform among

announcing it, starts to accumulate shares with the result of saving costs (the difference between the price it pays for the accumulation of the shares and the takeover price).

⁴⁹ See DAVIES, *cit.*, 53. For the economics of takeovers, see F.M. MUCCIARELLI, 2014, *Le offerte pubbliche di acquisto e di scambio*, Torino, 57. For policy implications, the self-insider possibility of the stake-building activity in a takeover context is what is perceived to be really at stake, at least in Italy, following the *Cremonini* decision of the *Cassazione*. See GILOTTA, *Riflessioni, cit.*, 411; MAUGERI, *cit.*. Indeed, if the door of the self-insider is opened in the delisting case, without a proper and convincing distinction between normal takeover and delisting takeover, as the Italian *Cassazione* omitted to make, the next step could be opening the door to the normal takeover with possible negative consequences in the market for corporate control. The problem of course is relevant also for the European context and for each Member State.

⁵⁰ To be sure, DAVIES, *cit.*, 247 doubted whether Recital 11 IID had the single interpretation the various authors were giving to it. With respect to the relationship between the decision to launch a takeover and the pre-bid acquisition of shares (at a discounted price over the offering price) before the bid is made public, he pertinently noted: "The reason, however, that the pre-bid acquisition appears vulnerable is *not* that it is made on the basis of prior decision to acquire those shares, but rather that it is made when the acquirer knows it will shortly be making a general public offer at a higher price for the class of shares in question. It is far from clear that the decision to make a future bid is caught by the language of the preamble. After all, the decision to acquire in the market some shares of a particular class does not 'necessarily' involve a decision to make a general bid; all it necessarily involves is a prior decision to acquire those shares".

⁵¹ GALGANO, *cit.*; HOPT, *cit.*, 60. DAVIES, *cit.* The same Consob in Italy excluded in 1996 the stakebuilding activity (*rastrellamenti*) for takeovers from insider trading, Consob, 1997, *Relazione per l'anno 1996*, 92, at disposal on the Consob site.

⁵² On takeovers and MAD, see M. NELEMANS and M. SCHOUTEN, 2013, *Takeover bids and insider trading*, in BAINBRIDGE, *cit.*, pp. 449. A further problem during the MAD regime was the non-uniform application by the Member States of Article 2.2 of Directive 124/2003/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation definition and public disclosure of inside information and the definition of market manipulation, L 339/70, 24.12.2003, see J.L. HANSEN and D. MOALEM, 2009, *The MAD disclosure regime and the twofold notion of inside information: the available solution*, in *Capital Markets Law Journal*, pp. 323; C. DI NOIA and M. GARGANTINI, 2012, *Issuers at Midstream: Disclosure of Multistage Events in the Current and in the Proposed EU Market Abuse Regime*, in *European Company and Financial Law Review*, 484, 507; S. LOMBARDO, 2019, *Einige*

Member States. Furthermore, there is a close correspondence between the notion of inside information (including also intermediate steps of protracted processes) for the purpose of the prohibition of insider trading (Articles 8: *insider dealing* and 10 MAR: *unlawful disclosure of inside information*) and for the purpose of disclosure (Article 17 MAR).⁵³ At the same time, the relationship between takeovers and inside information (both with respect to the two prohibitions and to disclosure) has become more complex and, apart from Recital 31 MAR, also Recital 30 MAR refers to takeovers and inside information, as well as Article 9.4 MAR on legitimate behavior and Article 11.2 MAR on market soundings and finally Article 23.3 MAR. The complexity of this topic cannot be covered here.⁵⁴

The third case of possible behavior of self-insider is when an important manager (like the CEO) decides to resign and decides to exploit her decision, which has possible consequences on the share's price, in order to trade.⁵⁵ The *Geltl* case decided by the ECJ dealt not with the abusive conduct of Mr. J.S. (unlawfully share dealing), but with a problem of the timing of disclosure of the inside information relating to his resignation.⁵⁶ Article 19 MAR provides for a system of disclosure (to the issuer, to the national competent authority and to the market) of managers' transactions in order to increase market transparency (Recitals 58-61 MAR). This system is supposed to work also as a mechanism to signal (ex post) to the market the managers'

rechtsvergleichende Fälle zwischen Italien und Deutschland in den Harmonisierungsbestrebungen des europäischen Kapitalmarkts, in L. KLÖHN and S. MOCK, (Hrsg.), *Festschrift 25 Jahre WpHG. Entwicklung und Perspektiven des deutschen und europäischen Wertpapierhandelsrecht*, Berlin, pp. 1187, 1193; Apparently, Article 2.2 did not mention the reasonable future as object of disclosure. This could have implied a non-strict correspondence of the notion of inside information for the purposes of the prohibition of insider trading (Article 2, 3 and 4 MAD) and for disclosure (Article 6 MAD). This divergence in the application of European law produced the consequence also of a possible non-coincidence between time of disclosure for the purposes of Article 6 MAD and Article 6 TOD, because of the usually protracted nature of the takeover process.

⁵³ On the disclosure obligation, see J.L. HANSEN, 2017, *Issuers' duty to disclose inside information*, in *ERA Forum*. See also A. PIETRANCOSTA, 2017, *Article 17: Public disclosure of inside information*, in VENTORUZZO and MOCK, *cit.*, pp. 343.

⁵⁴ See generally C. KUMPAN and C.J. HOPT, 2017, *Insidergeschäfte und Ad-hoc-Publizität bei M&A*, in *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, pp. 765.

⁵⁵ See also VENTORUZZO and PICCIAU, *cit.*, 188.

⁵⁶ Case C-19/11 of 28 June 2012, on which, see A. HELLGARDT, 2013, *Note*, in *Common Market Law Review*, pp. 861.

transactions involving the shares of their company.⁵⁷ However, from the perspective of the self-insider (i.e. the exploitation of the decision to resign before the decision of resignation is communicated according to Article 17 MAR), two drawbacks are likely to emerge: (i) the notification of the transaction is possibly anticipated with respect to the communication of resignation according to Article 17 MAR, but more importantly, (ii) the decision to resign has possibly a significant (negative or positive) impact on the shares' price and cannot be signaled to the market by a normal notification pursuant to Article 19 MAR. In other words, the notification system of Article 19 MAR is inadequate to explicitly signal to the market the motives for the managers' transactions, which could be due to several other reasons.⁵⁸

The fourth cases of the self-insider concerns an important shareholder who takes a decision about how to behave/vote in an important company's decision and uses this inside information (his decision about how to behave/vote) to trade on the market before the decision is made public. More in particular, one can think to a market sounding context of Article 11 MAR related to a capital increase which is typically structured in intermediated steps of the protracted process (Article 7.3 MAR).⁵⁹ In this context, an important shareholder, who is sounded and asked about his participation in the company's possible capital increase, before the decision of the capital increase is made public, could trade on his (pivotal) decision on how to vote in the shareholder's meeting, in order to anticipate the probable results of the shareholder's meeting decision, where his decision is pivotal. Article 11.7 MAR clearly states that the person receiving the market sounding shall assess for himself whether he is in possession of inside information. In this context, the decision of the shareholder to participate (or not to participate) in the capital

⁵⁷ By the implicit assumption that there could be inside information at the basis of their trading. On Article 19 MAR, see M. DELL'ERBA, 2017, *Art. 19: Managers' transactions*, in VENTORUZZO and MOCK, *cit.*, pp. 400.

⁵⁸ Including, even if not permitted, possibly also "typical" reasons of managers' insider dealing on inside information different from the decision to resign. In any case, Article 19.11 MAR provides for a quiet period of 30 days before the communication of financial reports.

⁵⁹ On this case, see S. LOMBARDO, 2016, *I sondaggi di mercato: prime riflessioni*, in *Le Società*, pp. 159, 161.

increase could be considered as a decision that creates inside information about the behavior of the shareholder in the shareholder's meeting with material consequences on the price.⁶⁰

Finally, the fifth case is the stake-building activity that has been apparently problematized by German legal scholarship.⁶¹ Normal trading does not have a material impact on prices particularly in very liquid markets. But the decision of a potential investor to buy e.g. 3% of the shares of an issuer could have a material impact on the shares' price, making this stake-building decision an inside information. MAR refers to the stake-building activity in Article 1(31) MAR where the definition is provided for, and in Article 9.4 MAR that excludes stake-building from the insider trading exemptions granted in case of takeover and merger.

4. The self-insider under European law

The question of the self-insider can be analyzed by considering the case law of the ECJ (Section 4.1) and the regulatory provisions of MAR (Section 4.2).

4.1. The ECJ case law

At European level the notion of self-insider was directly and explicitly treated by the ECJ in the *Georgakis* case.⁶² Referring to the IDD and clearly contrary to the opinion of the Advocate General, who neglected the hypothesis that the originator of an information can possess and use this inside information,⁶³ the Court clearly stated that it is possible to be the originator of a decision which becomes inside information.⁶⁴ In this case, a group of persons took a collegial decision, which originates the inside information and these persons possess it.⁶⁵ Nevertheless,

⁶⁰ LOMBARDO, *I sondaggi*, cit.

⁶¹ See KLÖHN, *Selbst geschaffene*, cit., 45.

⁶² Case C-391/04 of 10 May 2007, see D. MOALEM and J.L. HANSEN, *Insider Dealing and Parity of Information – Is Georgakis Still Valid?*, in *European Business Law Review*, pp. 949.

⁶³ Opinion of the Advocate General Mengozzi of 25 October 2006, particularly points from 49.

⁶⁴ See also KLÖHN, *Selbst geschaffene*, cit., 45.

⁶⁵ See points 33 and 35 of *Georgakis*. Nevertheless, one could argue that the alterity of the information in the case of a collegial decision is granted because of the collegial nature of the decision (the information originates from an exchange amongst parties) while in a personal decision the information generates from a single person without exchange.

the Court added that in this particular case the parties did not take advantage of the information created by their collegial decision, because all of them were trading among themselves on the basis of the same inside information they created, i.e. in a condition of parity of information.⁶⁶

To answer the question of the sanctionability of the self-insider it is also possible to use the interpretative format provided by the ECJ in *Spector*.⁶⁷ *Spector* focuses on the verb “use”, present in the MAD, to find a possible distinction with the terms “full knowledge”, present in the IDD. *Spector* does not explicitly refer to the issue of the meaning of the term “information” to explain whether it contains or not an implicit alterity element (*Drittbezug*), as communication between at least two different parties.⁶⁸ In *Spector* the ECJ ruled out the presumption of use of inside information by a person under a rule of rebuttal. The extent to which the presumption-rebuttal format is the same for primary insiders and for secondary insiders is debated.⁶⁹ The Court stated that, the “question whether that person has infringed the prohibition on insider dealing must be analysed in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence, which is based, in particular, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information”.⁷⁰

This ruling has been interpreted as creating a standard, by which the ECJ uses information equality to protect financial market integrity and to enhance investor confidence. The standard is used to evaluate behaviors not covered by the MAD/MAR in order to fill interpretative gaps.⁷¹ Precisely this standard of presumption with rebuttal was used by the Italian *Corte di Cassazione* to argue the existence of the self-insider in the *Cremonini* case, by admitting the presumption

⁶⁶ Point 30 of *Georgakis*.

⁶⁷ On *Spector*, more extensively see the literature mentioned *supra* in fn. 33.

⁶⁸ The ECJ did not made a reference on this point to *Gerogakis*.

⁶⁹ See KINANDER, *cit.*.

⁷⁰ *Spector*, point 61.

⁷¹ KLÖHN, *The European*, *cit.*.

and neglecting the possible rebuttal.⁷² However, in the *Cremonini* case, the presumption standard of *Spector* could also have been employed to reach the opposite conclusion.⁷³

4.2. The MAR regulatory provisions

The Market Abuse Regulation represents the evolution of the insider trading discipline by way of a refinement of previous legislation (IDD and MAD). Unfortunately, MAR does not provide a clear legal answer about the existence and sanctionability of the self-insider.⁷⁴

On one hand, already the mere fact that the MAR provides for regulation of at least one case of self-insider (the criminal insider of Article 8.4(d) MAR) can be advanced to argue that the self-insider can be realistically dealt with from a regulatory perspective.⁷⁵ On another, Article 9 MAR (legitimate behaviour), regulates some hypotheses of possession of inside information (as in points 56-60 of *Spector*) but states their non-use and provides for a (non-exhaustive?)⁷⁶ list of legitimate behavior.⁷⁷ In this context, Article 9.5 MAR (former Recital 30 MAD and Recital 11 IDD), serves as a general rule to interpret the possible cases of self-insider, when it states that for *the purposes of Articles 8 and 14, the mere fact that a person uses its own knowledge that it has decided to acquire or dispose of financial instruments in the acquisition or disposal of those financial instruments shall not of itself constitute use of inside information.* According to the

⁷² See *Cassazione civile, cit.*, point 5.

⁷³ It could have been used in order to argue that, if it is true that alterity is not required as a prerequisite for inside information, it is also true that there is no real use of inside information, because of Recital 30 MAD. This Recital, as Recital 11 IDD, permits the use of own decisions so that there is a presumption of use of an inside information (own decision) but with a convincing rebuttal given by Recital 30; on this argument see also RAFFAELE, *cit.*, 786/II. See for other possible rebuttals the examples provided by the ECJ in the points from 56 to 60 of *Spector*.

⁷⁴ Notably, while MAR uses the terms 'use', MAD2 uses the term 'possess'.

⁷⁵ The arguments by the ECJ in the *Georgakis* case reinforce this interpretation.

⁷⁶ According to R. VEIL, 2014, *Europäisches Insiderrecht 2.0 – Konzeption und Grundsatzfragen der Reform durch MAR und CRIM-MAD*, in *Zeitschrift für Bankrecht und Bankwirtschaft*, pp. 85.

⁷⁷ On Article 9 MAR, see S. SIEDER, 2017, *Legitime Handlungen nach der Marktmissbrauchsverordnung (MAR)*, in *Zeitschrift für Finanzmarktrecht*, pp. 171; L. KLÖHN, 2017, *Die Regelung legitimer Handlungen im neuen Insiderrecht (Art. 9 MAR)*, in *Zeitschrift für Bankrecht und Bankwirtschaft*, pp. 261; J.L. HANSEN, 2017, *Legitimate behaviour*, in VENTORUZZO and MOCK, *cit.*, pp. 254.

meaning commonly assigned to this provision,⁷⁸ Article 9.5 MAR seems to acknowledge the possible existence of the self-insider, i.e. to consider a person's decision/intention as inside information, but at the same time to preclude the applicability of the sanctions on the basis of absence of the use of its own knowledge in the decision to dispose of financial instruments. This Article is reinforced by the first part of Recital 31 MAR.⁷⁹ Nevertheless, there is doubt whether Article 9.5 MAR clearly permits self-insider trading.⁸⁰ Indeed, for instance in the takeover context, the decision to make cheaper pre-bid acquisitions of shares in order to build up a stake in the company before the decision to bid is made public can be considered a different decision than the decision to launch the takeover. There are indeed two decisions (and transactions) in this case: (i) the decision to do the takeover and (ii) the decision to make the pre-bid acquisitions. One can legitimately think that in realizing the pre-bid acquisitions only the second decision/transaction is concretized and is covered by Article 9.5 MAR and the first part of Recital 31 MAR, with the exclusion of the first decision/transaction, which is a different one and is not covered by the exemption. This interpretation is maybe limited because the second period of the first part of Recital 31 MAR complicates the picture. It states that acting *on the basis of one's own plans and strategies for trading should not be considered as using inside information*.⁸¹ This can

⁷⁸ And to Recital 11 IDD and 30 MAD, see e.g. HOPT, *cit.*, 60; KLÖHN, *Die Regelung, cit.*, 270.

⁷⁹ Recital 31 provides: *Since the acquisition or disposal of financial instruments necessarily involves a prior decision to acquire or dispose taken by the person who undertakes one or other of those operations, the mere fact of making such an acquisition or disposal should not be deemed to constitute use of inside information. Acting on the basis of one's own plans and strategies for trading should not be considered as using inside information. However, none of those legal or natural persons should be protected by virtue of their professional function; they should only be protected if they act in a fit and proper manner, meeting both the standards expected of their profession and of this Regulation namely market integrity and investor protection. An infringement could still be deemed to have occurred if the competent authority established that there was an illegitimate reason behind those transactions or orders or that behaviour, or that the person used inside information.* Also the second part of Recital 54 excludes the possibility of the self-insider but according to KLÖHN, *Selbst geschaffene, cit.*, 46, is due to a redundant refusal. There is also a difference between the wording of Recital 11 IDD and Recital 31 MAR and Article 9.5 MAR. Indeed, while Recital 31 MAR refers to the decision as did Recital 11 IDD, Article 9.5 MAR refers to knowledge relating to a decision, *a person uses its own knowledge that it has decided to ...*

⁸⁰ See also DAVIES, *cit.*, *supra* fn. 50.

⁸¹ This second period is in any case only present in Recital 31 MAR and not in Article 9.5 MAR.

be read either as confirming the presence of two different decisions or the presence of one single decision.⁸²

Given the first and the second sentences of the first part of Recital 31 MAR, unfortunately, the second part of Recital 31 limits the first part and provides for the possible sanctionability. The possible sanctionability is also foreseen by Article 9.6 MAR, because the competent authority can establish that there was an illegitimate reason for the transactions or behaviors concerned. Article 9.6 MAR, which refers to all possible legitimate behaviors of Article 9 MAR and not only to the self-insider of Article 9.6 MAR, has been strongly criticized by legal scholars.⁸³

The complex of regulatory prescriptions of Article 9 MAR (in particular, Article 9.5 and 9.6 MAR) appears to replicate the standard of presumption/rebuttal provided by the ECJ in *Spector* also for the special case of the self-insider; but the standard is reversed. Indeed, the behavior of the self-insider is exempted from the prohibitions (i.e. there is possession of inside information but not its use) but it can be demonstrated that the use of the self-created inside information worked against investor confidence and market integrity. In other words, a self-insider is not guilty until it is demonstrated that he is guilty. This is an unsatisfactory conclusion given the criminal dimension of the self-insider and the necessary guarantees related to criminal sanctions. This interpretation is nevertheless confirmed by Recital 23 MAR (a new Recital not present either in the IDD or in MAD), which enlarges the scope of application of the insider trading prohibitions to ensure equal access in order to grant market integrity and investor protection.

5. The status of the self-insider

Having outlined the single and systematically confusing interpretative textual elements, whilst acknowledging the overall quite extensive regulatory rationale of the MAR, it is now necessary to answer the question of the existence and sanctionability of the self-insider from

⁸² Indeed, acting *on the basis of one's own plans and strategies for trading*, could be dynamically interpreted as including in the single decision/transaction also the pre-bid acquisitions.

⁸³ Indeed, Article 9.6 MAR is a problem in the light of the possible criminal sanctions and is certainly not a presidium of more legal certainty and less regulatory complexity for market participants (Recital 4 MAR), see VEIL, *cit.*, 92; KLÖHN, *Die Regelung, cit.*, 270; VENTORUZZO, *Qualche nota, cit.*, 747.

another perspective, i.e. the economic one.⁸⁴ The problem of the self-insider is puzzling, because (i) the paradigm of market egalitarianism taken to its extreme application would prohibit the use of inside information based on a self-insider's own material decision,⁸⁵ but at the same time (ii) the unerodable advantage of the self-insider based on own decisions is difficult and impracticable to prohibit.⁸⁶ In other words, a proper interpretation of the equal access paradigm, which is the core of the European insider trading system, would tend to prohibit self-insider trading activity. Nevertheless, the strict application of the rule (where effectively possible) could have the practical consequence of prohibiting behaviors which are possibly efficient or should be tolerated in order to pursue other objectives. For this reason, it is necessary to limit the scope of application of the insider trading prohibition of the self-insider to a specific type of self-insider, i.e. the monopoly-square self-insider. The relation between the principle of equal access in order to grant parity-of-information among investors (market egalitarianism) and the sanctionability of the self-insider needs to be analyzed in its essential economic terms in order to decide whether there is abusive exploitation of inside information. This Section interprets the content of Article 9.6 MAR and attempts to limit its scope of application to a common characteristic of the involved behavior. This is done both in order to avoid a possible divergent application by national authorities of uniform EU law and to create predictability and certainty of law in a delicate context possibly covered by criminal sanctions. This Section firstly briefly summarizes the economic problem of insider trading and the economics of MAR,⁸⁷ (Section 5.1) then develops the theory of the monopoly-square self-insider to solve the policy problem (tension between Article 9.5 and 9.6 MAR) (Section 5.2) and finally applies the monopoly-square self-insider to the single cases enumerated in Section 3 (Section 5.3).

5.1 The economics of insider trading and the economics of MAR

⁸⁴ At this stage of the discussion provided in this article one can argue that MAR recognizes the existence of the self-insider.

⁸⁵ BAINBRIDGE, *Regulating, cit., supra* fn. 15 and accompanying text.

⁸⁶ BRUDNEY, *cit., supra* fn. 20 and accompanying text.

⁸⁷ This basic assumption of the European system of equal access and information parity as provided for by the MAR and repeated by the ECJ is not doubted or debated here but is taken as a starting point for the analysis.

Insider trading is a (legal) problem that has been diffusely discussed also from an economic⁸⁸ and law and economics perspective.⁸⁹ Given the economics of information,⁹⁰ the economics of property rights,⁹¹ and the same (economics of) information as a property right,⁹² already in normal contract law there can be a problem of asymmetric information between two contracting parties. In the contractual context, the question is whether the contracting party with more information owns a duty of disclosure of such information to the other contracting party.⁹³ The (tentative) answer to this question is that there is no duty to disclose, if the person with more information has invested resources in order to acquire this information advantage.⁹⁴ In this way, resources are efficiently allocated by the contract to those who value them more, precisely because they have invested resources in obtaining informational advantages.

In the broader context of the discussion about informationally transparent (efficient) capital markets,⁹⁵ the question of whether to allow or not insider trading has historically been

⁸⁸ Both with theoretical models and with empirical research, for a recent survey, U. BHATTACHARYA, 2014, *Insider Trading Controversies: A Literature Review*, pp. 385.

⁸⁹ The (US) literature on insider trading is immense. Just two references with opposing views for the renewed debate of the 1980 years, D.W. CARLTON and D.R. FISCHER, 1983, *The Regulation of Insider Trading*, in *Stanford Law Review*, pp. 857; J. SELIGMAN, 1985, *The Reformulation of Federal Securities Law Concerning Nonpublic Information*, in *Georgetown Law Journal*, pp. 1083.

⁹⁰ G.J. STIGLER, 1961, *The Economics of Information*, in *Journal of Political Economy*, pp. 213.

⁹¹ H. DEMSETZ, 1967, *Toward a Theory of Property Rights*, in *American Economic Review, Papers and Proceedings*, pp. 347; R.H. COASE, 1960, *The Problem of Social Cost*, in *Journal of Law and Economics*, pp. 1.

⁹² Considering information also as a possible public good, the question has also been to what extent it is optimally produced privately, K.J. ARROW, 1962, *Economic Welfare and the Allocation of Resources for Invention*, in *The Rate and Direction of Inventive Activity: Economic and Social Factors*, National Bureau of Economic Research, Inc, pp. 609; H. DEMSETZ, 1969, *Information and Efficiency: Another Viewpoint*, in *Journal of Law and Economics*, pp. 1; J. HIRSHLEIFER, 1971, *The Private and Social Value of Information and the Reward to Inventive Activity*, in *American Economic Review*, pp. 561.

⁹³ The classical reference point in the law and economics literature, is the seminal article by A.T. KRONMAN, 1978, *Mistake, Disclosure, Information, and the Law of Contracts*, in *Journal of Legal Studies*, pp. 1, 9.

⁹⁴ KRONMAN, *cit.*, 16.

⁹⁵ In the capital market (securities regulation) context the issue has been related to the disclosure obligation of issuers related to the IPO stage and to the disclosure after listing, in terms of optimal/efficient disclosure of information and regulatory competition, see R.J. GILSON and R.H. KRAAKMAN, 1984, *The Mechanism of Market Efficiency*, in *Virginia Law Review*, pp. 549; J.C. COFFEY JR., 1984, *Market Failure and the Economic Case for a Mandatory Disclosure System*, in *Virginia Law Review*, pp. 717; F.H. EASTERBROOK and D.R. FISCHER, *Mandatory Disclosure and the*

analyzed in efficiency terms basically from two perspectives:⁹⁶ (i) insider trading as a mechanism to ensure efficient pricing, i.e. a price that includes all information in the market, and (ii) insider trading as a compensation device. Independently from the general answer about the efficiency (and fairness) of insider trading from the two mentioned perspectives, MAR is a piece of legislation that can be interpreted in economic terms (in efficiency terms) by making few but focal statements.⁹⁷

First, in the MAR context, inside information belongs, as a general rule, to the market in order to provide investors with equal access (market egalitarianism).⁹⁸ This means that according to MAR the property right of the inside information belongs to the market, where informed investors profit from equal access.⁹⁹ This legal solution by the European legislator assumes that

Protection of Investors, 669; R. ROMANO, *Empowering Investors: A Market Approach to Securities Regulation*, in *Yale Law Journal*, 2359; M.B. FOX, 1999, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Protection*, in *Virginia Law Review*, pp. 1335; more recently, for a general overview of (mandatory) disclosure, L. ENRIQUES and S. GILOTTA, *Disclosure and Financial Market Regulation*, in FERRAN, MOLONEY and PAYNE, *cit.*, pp. 512.

⁹⁶ On these two points see S.M. BAINBRIDGE, 1986, *The Insider Trading Prohibition: A Legal and Economic Enigma*, *University of Florida Law Review*, 37, 42; KRAAKMAN, *cit.*, 47.

⁹⁷ These statements are made in very essential (apodeictical) terms in order to focus on the core regulatory principles and provisions of MAR. I start from the assumption that the European legislator in shaping MAR has pursued economic efficiency in terms of a Pareto efficient state of the world resulting from the regulatory system (on efficiency in securities regulation, see KÖNDGEN, *cit.*). The principle of equal access statutorily included in MAR (which clearly differentiates the regulatory philosophy of the European system from the US system) can be interpreted alternatively, assuming that: (i) either the European legislator thinks in good faith that equal access ensures a first best solution in efficiency terms (ii) or the European legislator thinks that, given equal access for another regulatory reason other than efficiency (which is of course a legitimate regulatory and political choice) efficiency has to be in any case reached in terms of second best solution.

⁹⁸ On the point see also J. PAYNE, 2019, *Disclosure of Inside information*, in VEIL and V. TOUNTOPOULOS, *cit.*, pp. 89, 89.

⁹⁹ According to the developments of modern finance theory as interpreted by legal scholarship, the only relevant group of potential investors who are essential for the proper working of capital markets is the one of the information traders, being liquidity traders and noise traders of minor importance. More in particular, in the insider trading context, the tension is between liquidity traders and insiders, meaning insiders (and outsiders) who exploit inside information, and the scope of securities regulation is to protect information traders (sophisticated professional investors and analysts), by creating a competitive market for information granted to them, see Z. GOSHEN and G. PARCHOMOVSKY, 2006, *The Essential Role of Securities Regulation*, in *Duke Law Journal*, pp. 711. See also Z. GOSHEN and G. PARCHOMOVSKY, 2001, *On Insider Trading, Markets, and Negative Property Rights in Information*, in *Virginia Law Review*, pp. 1229. For an application of this taxonomy to the European context, see L. Klöhn, 2013, *Wertpapierhandelsrecht diesseits und jenseits des Informationsparadigmas*, in *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*, pp. 349.

information is a public good,¹⁰⁰ with positive externalities,¹⁰¹ and serves primarily the function of correct and efficient pricing (i.e. of point (i)).

Secondly, given the distinction between inside information relating *directly* (corporate) or *indirectly* (market) to an issuer,¹⁰² according to Article 17.1 MAR, an issuer has a duty to disclose only *direct* (corporate) information. Indeed, the provision of continuous disclosure of Article 17 MAR is quite extensive and pervasive but is limited to the inside information which directly concerns the issuer and which the issuer should know.¹⁰³ In other words, the issuer is obliged to optimally search for, know and disclose direct/corporate inside information, because the issuer is supposed to be the *least cost information seeker*.¹⁰⁴

Thirdly, what follows from the second point is that there is an asymmetry in coverage between inside information for the purposes of insider trading and for the purposes of disclosure, even if the two contexts use the same notion of inside information.¹⁰⁵ This asymmetry means that the statement made in the first point must be relativized with respect to the disclosure of indirect/market inside information. Indeed, the extent to which indirect/market inside

¹⁰⁰ Whether this assumption is correct or not is of course outside the scope of this article. For the public good perspective, see COFFEE JR., *cit.*, 723 in favor and EASTERBROOK and FISCHER, *cit.*, 680 against.

¹⁰¹ On the public good character and the externality argument, see ENRIQUES and GILOTTA, *cit.*, 521.

¹⁰² VENTORUZZO and PICCIAU, *cit.*, pp. 199; PIETRANCOSTA, *Article 17, cit.*, 356.

¹⁰³ According to Recital 47 MAR one could think that the primary scope of Article 17 MAR is not to ensure efficient pricing but to discourage the incentive to practice insider trading (*The public disclosure of inside information by an issuer is essential to avoid insider dealing and ensure that investors are not misled*). But this limited reading does not consider sufficiently the systematic reading of article 17 MAR in combination with the principle of equal access. Apart from the peremptory provision of Article 17.1 MAR, which can be interpreted after *Geltl* as a right of the market to be informed quickly to ensure informed/efficient pricing/trading, the delay of Article 17.4 (and 17.5) and 17.7 MAR is an exception to this rule, which has to be interpreted in a restrictive way. See also Article 17.8 MAR in prohibiting selective disclosure. Furthermore, the inclusion of inside information as intermediate steps in a protracted process (Article 7.3 MAR and 17.4 MAR) reinforces the reading of Article 17 MAR primarily as a mechanism to ensure efficient pricing and only secondarily to discourage insider trading.

¹⁰⁴ On this point, see also L. KLÖHN, 2017, *Die (Ir-)Relevanz der Wissenszurechnung im neuen Recht der Ad-hoc-Publizität und des Insiderhandelsverbot*, in *Neue Zeitschrift für Gesellschaftsrecht*, 1285, 1287 and 1288.

¹⁰⁵ Indeed, while the prohibitions of insider trading do have a broader scope because they include *direct* (corporate) as well as *indirect* (market) information, the obligation to disclose is limited by Article 17 MAR to the direct/corporate inside information.

information is channeled to the market for efficient pricing (point (i)) is something that is not regulated.¹⁰⁶

Fourth, the regulatory scope of MAR is quite extensive in relation to secondary insiders (Article 8.4 MAR, outsiders in US terms), because they do not need a link with a primary insider (insider in US terms)¹⁰⁷ as was during the IDD.¹⁰⁸ In this way, the category of secondary insiders, without the requirement of any fiduciary duty obligation and exposed to the prohibitions of corporate as well as market inside information, in Europe includes a potentially endless number of persons/situations.¹⁰⁹

Fifth, given the extensive statutory definition of inside information, the asymmetry in the disclosure regime of direct/corporate and indirect/market inside information, and the quite extensive liability of primary and secondary insiders, the position of informed investors is quite complex under MAR because they operate at the delicate border of the combination between direct/corporate and indirect/market information, included in the definition of inside information and of insider trading (Article 17.8 MAR, Article 20 MAR and Recital 28 MAR).¹¹⁰

5.2. The economics of the self-insider: the monopoly-square self-insider

¹⁰⁶ For indirect inside information there is not a general duty of disclosure because of the impossibility to statutorily set the rules related both to the objects as well as the subjects of this duty. In other words, for indirect inside information it is not possible to identify the least cost information seeker for all possible situations and oblige him to disclosure. The best regulatory regime is to set for him the prohibition both to disclose and to trade/recommend/induce, sacrificing the efficient pricing aspect. As for direct/corporate inside information, also for indirect/market information there is for primary and secondary insiders a prohibition of unlawful disclosure of inside information (Article 10 and Article 14 MAR) which concretizes, as a general rule, the impossibility to appropriate indirect/market inside information also for disclosure purposes.

¹⁰⁷ According to GREENE and SCHMID, *cit.*, 377, and without being able to deepen the issue here also the notion of primary insider is apparently broader in Europe than in the US.

¹⁰⁸ On this point GILOTTA, *The Regulation, cit.*.

¹⁰⁹ The extent to which the presumption of possession can be extended to secondary insider given the different sanctions (as provided by MAR and MAD2) is discussed by KINANDER, *cit.*.

¹¹⁰ See on informed trading, L. KLÖHN, 2016, *Eine Neue Insiderfälle für Finanzanalysten*, in *Zeitschrift für Wirtschaft und Bankrecht*, pp. 1665 also with respect to Recital 28 MAR; PIETRANCOSTA, *Article 17, cit.*, 365, GILOTTA, *The Regulation, cit.*, 651; M. DELL'ERBA, *Article 20: investment recommendations and statistics*, in VENTORUZZO and MOCK, *cit.*, pp. 164.

Section 5.1 has explained the very broad and extensive statutory prescriptions of MAR to promote equal access among investors, which is instrumental to market integrity and investors' confidence. Attention has now to be moved to the analysis of the behavior of the self-insider in the equal access paradigm proper of MAR. This equal access paradigm philosophy taken to extreme interpretation would forbid, by definition, all hypotheses of self-insider, but MAR includes Article 9.5 and Article 9.6. For this reason, it is necessary to identify a particular type of self-insider in order to distinguish between allowed (Article 9.5 MAR) and not allowed (Article 9.6 MAR) self-insider behaviors. My argument is that not all self-insider behavior should be prohibited but only the monopoly-square (or monopoly²) self-insider behavior: Article 9.6 MAR should be applied only to the monopoly-square self-insider.

More in particular, the core of the economic problem of the monopoly-square self-insider as proposed in this article, is the fact that the monopoly-square self-insider is the result of a monopolistic decision by the originating party (the self-insider) about an issuer or a financial instrument that can be taken and exploited only by this originating party. The originator is exploiting a decision that only she can take and for this reason this monopolistic decision not only has the nature of inside information (Article 9.5 MAR) but has to be sanctioned because its use is against market integrity and investor confidence (Article 9.6 MAR). In the case of a monopolistically taken decision (inside information) the actor is the only one that is eligible (i.e. she is in power) for taking that decision. By using this monopolistic decision in a context of asymmetric information about this decision with the rest of the market, the self-insider is abusing his position in the market: for this reason, this particular behavior can be functionally compared (analogized) to a form of abuse of dominant position proper of competition law.

The analogy between the market abuse of MAR and market abuse in competition law is not new. It has been argued that antitrust “and capital market rules are closely connected because market integrity is the common denominator of both”.¹¹¹ Market abuse of MAR includes

¹¹¹ TOUNTOPOULOS, *cit.*, 299. The analogy between insider trading law and antitrust law in terms of abuse of inside information can be already made in the context of the normal insider trading: (i) a person enjoys an advantage by possessing inside information and (ii) this person profits from this inside information by (ab)using (of) it; on the point see HANSEN, *Market Abuse, cit.*, 378. For the possible application of competition law rules to securities regulation (in

abuse of inside information and market manipulation. Both can be qualified in antitrust terms as types of abuse in analogy with competition law: abuse of the asymmetric (i.e. monopolistic) knowledge (insider trading) and abuse of some behaviors that monopolistically alter the efficient formation of prices (market manipulation).

Given the general abuse of asymmetric information proper in all cases of insider trading, in the case of the monopoly-square self-insider, the abuse derives not simply from the exploitation of normal inside information, but from the fact that the self-insider abuses a particular type of inside information: the one that only he is able to create by his decision.¹¹² The characteristic of this peculiar inside information is the result of a double monopoly situation. The first monopolistic element is the usual one: the insider uses inside information whose monopolistic element is toward the contracting party.¹¹³ The second monopolistic element (which is the qualifying one for this article) is that the self-insider creates inside information he solely can create. In this case, no other actor on the market can take such decision-inside information. The peculiar nature of the inside information in this case is not given by the fact that there is an asymmetry of information in relation to the *content* of the information but in relation to the *status* of the person creating the inside information. He is the only one in the market that can create the decision/inside information. In this case the nature of the monopoly is not limited toward the contracting party (content of the information) but the entire market: it is per se a form of a monopoly (one of status) vis-à-vis the entire market.

This peculiar inside information, only typical of the self-insider as qualified in this article, becomes in this way a monopoly of a monopoly or a monopoly-square (or monopoly²) information. In this context, the self-insider to be sanctioned according to Article 9.6 MAR is only the person that abuses inside information which is characterized twice by the classic

particular, for market manipulation), see S. SEIER, 2018, *Kartellrechtsrelevante Marktmanipulationen*, Baden-Baden, pp. 132.

¹¹² See already LOMBARDO, *L'insider, cit.*, 680/II.

¹¹³ This is the usual situation in a normal inside information context not present in the *Georgakis* case because all the contracting parties (those who had originated the inside information) were at the same level of information: i.e. there was no asymmetric information among them.

monopolistic element of all inside information. On the contrary, where the decision (inside information) can be taken by a plurality of persons, there is no necessity to sanction the self-insider, because the potentially competitive decision is not monopolistically influencing the pricing of the financial instrument, from a *status* perspective (Article 9.5 MAR). This line of reasoning applies to the insider trading regulatory system of the self-insider, the competition paradigm typical of competition law, where those behaviors are prohibited and sanctioned, that allow the monopolist to extract rents not granted in the competitive system where all actors are price takers. My argument is that in many normal self-insider cases, there is ex ante a potentially extended number of self-insiders who can exploit their decision/inside information. For this reason, the self-insider in competition with other self-insiders can be tolerated (Article 9.5 MAR). In the monopoly-square self-insider on the contrary there is only one eligible person. As mentioned, the asymmetry is not only in the *content* of the information but on the *status* of the self-insider. In this case, the self-insider enjoying a monopolistic status that is abused cannot be tolerated (Article 9.6 MAR).

5.3 The monopoly-square self-insider and the single cases

This line of reasoning of the monopoly-square self-insider as the only actor that can monopolistically take a decision (creating a peculiar inside information) in the market can now be fruitfully applied to the single cases analyzed in Section 3, i.e. the pre-bid acquisitions case, the important manager who resigns case, the pivotal shareholder case and finally the stake-building activity case.¹¹⁴

Pre-bidding share acquisitions are particularly delicate in the economics of (hostile) takeovers, because of the *search costs* and the necessity to build a *toehold*.¹¹⁵ In a nutshell, according to these arguments, the bidder is better positioned, if able to secretly build up a participation in the target company, while at the same time the efficiency of the competitive corporate control market is maximized. From a legal perspective, it could be argued that the

¹¹⁴ I do not consider the issuer as self-insider buying its own shares because regulated by Article 5 MAR.

¹¹⁵ See MUCCIARELLI, *cit.*, 57. DAVIES, *cit.*, 53; GILOTTA, *Riflessioni*, *cit.*, 415. The toehold up to 5% is allowed under the Williams Act to facilitate the takeover.

publication of the inside information of the decision to bid could be possibly postponed by a listed bidding company (Article 17.4 MAR), in order to buy shares at a lower price than the one of the bid, to facilitate the takeover of the target listed company.

The behavior of the self-insider in a normal hostile takeover context is not a policy concern for this article. Indeed, in the case of a normal (hostile) takeover there is a plurality of potential bidders on the market so that the inside information to bid (and its exploitation with pre-bid shares' acquisitions) is potentially not monopolistically taken by a single actor.¹¹⁶ This is the reason why according to the argument made in this article, given the search costs and toehold premises, pre-bid acquisitions of shares in normal competitive take-over contexts should be allowed for the purposes of MAR. By balancing different policy objectives, the efficient pricing objective proper of MAR is exceptionally limited to the extent necessary to pursue other (supposedly efficient) regulatory purposes, such as a(n) (efficient) market for corporate control (Article 9.5 MAR).¹¹⁷

At the same time, but on the contrary, pre-bid acquisitions of shares by the major shareholder in a takeover for delisting, cannot be justified in the context of MAR, because this is a particular takeover, whose decision can be monopolistically taken only by the controlling shareholder, as in the *Cremonini* case.¹¹⁸ In this case, pre-bid acquisitions of shares cannot be

¹¹⁶ Since the *Corte di Cassazione* in the *Cremonini* case did not differentiate between normal takeover and takeover for delisting, this has been the argument to justify the difference between a normal takeover and a delisting takeover in the *Cremonini* case, see LOMBARDO, *L'insider*, *cit.*, 680/II. In the takeover for delisting only one actor (the major shareholders) can take the decision to delist and exploit this monopolistic decision.

¹¹⁷ TOD's policy rationale (protection of shareholders: Recital 2 and 25 TOD and Article 3 TOD) is an argument outside the scope of this article, given also the fact that this directive is a minimum harmonization directive. On TOD, see L. ENRIQUES, 2004, *The Mandatory Bid Rule in the Takeover Directive*, in *European Company and Financial Law Review*, pp. 440; M. VENTORUZZO, 2006, *Europe's Thirteenth Directive and US takeover regulation: regulatory means and political and economic ends*, in *Texas International Law Journal*, pp. 171. On takeover, see G. FERRARINI and G.P. MILLER, *A Simple Theory of Takeover Regulation in the United States and Europe*, in *Cornell International Law Journal*, pp. pp. 301; L. ENRIQUES, R.J. GILSON and A.M. PACCES, 2014, *The Case for an Unbiased Takeover Law (with an Application to the European Union)*, in *Harvard Business Law Review*, pp. 85.

¹¹⁸ This statement requires the refinement that a third party could decide to make a takeover to buy the company in order to delist the company (and this third party could be of course anyone) but in this case this third party should also convince the major shareholder. More in particular, in this case the third party would have to support the search costs for finding the company and in order to launch the takeover he would have to propose a price whose amount has to take into account the control premium to be granted to the major shareholder (and shared to the other

economically justified because there is a monopoly status by the single offeror (i.e. the major shareholder) whose interest (to save money in the pre-bid acquisitions) is clearly in contrast with that of the market, which is to have always price transparency to allow the efficient formation of prices, functional to market integrity and investor confidence.¹¹⁹ In conclusion, for the major-shareholder of the delisting takeover case the exemption of Article 9.6 MAR should prevail over the rule of Article 9.5 MAR.

The second case of self-insider is the important manager (like the CEO) that decides to resign and starts to trade on financial instruments of his company before the disclosure of her decision pursuant to Article 17 MAR. As mentioned in Section 3, the acquisitions by the managers must be ex post reported (Article 19 MAR: *internal dealing*). The reporting mechanism is supposed to be able to signal ex post to the market the manager's trading activity. At the same time, this reporting mechanism is not able to perfectly distinguish whether the manager's trading activity is based on inside information or not.¹²⁰ If based on inside information, furthermore, the reporting mechanism is not able to signal whether it is based (i) on the self-insider decision to resign or (ii) on other inside information. For this reason, this communication duty represents only a limited instrument for efficient price formation. The material self-insider decision of a manager about his relationship with the issuer could be dealt with by national company law rules but this approach would weaken the uniform application of MAR.¹²¹ Given the premise of equal access on which MAR is shaped, a single MAR solution appears to be more in line with its spirit.

shareholders). In the delisting case there is no control premium to be granted by the major shareholder to the other shareholders but only the delisting price. This is the major difference between the price for a delisting takeover and the price for a normal takeover.

¹¹⁹ While in the normal takeover context the search costs are of possible importance, in the delisting takeover context searching costs are absent, because the major shareholder controls the company.

¹²⁰ Abusing of the category proposed by GILSON and KRAAKMAN, *cit.*, 573, one could argue that the market's observing ex post internal dealing represents a type of trade decoding.

¹²¹ Given the European shift of insider trading from company law to capital market law, on which see P.L. DAVIES, 1991, *The European Community's Directive on Insider Dealing: From Company Law to Securities Market Regulation?*, in *Oxford Journal of Legal Studies*, pp. 92, the company law solution that could be treated also on the basis of compensation device mechanism, has to be refused because the issue at stake is not a question about the manager and the company but the manager and the market.

In this context, the material self-insider decision of a CEO to resign can be considered monopoly-square inside information,¹²² and for this reason can be subject to the provision of Article 9.6 MAR. On the contrary, the extent to which the self-insider decision of a plurality of directors about their relationship with the company (e.g. in case of resignation) can be characterized as material monopoly-square inside information depends on a combination of factors that is difficult to be analyzed ex post.¹²³ As a general rule, in the case of self-insider directors the exemption of Article 9.5 MAR should be applied with the (weak) possibility to apply Article 9.6 MAR.

The third case is the important shareholder that in anticipation of his voting decision in a shareholders' meeting, trades in the financial instruments of the issuer using the inside information on his decision on how to vote in the general assembly. This case is a very theoretical one and, like the preceding ones, could also be analyzed and solved with national company law doctrines but the consequence would be a non-uniform application of MAR. Under a MAR perspective, the practical case of a pivotal shareholder abusing his self-insider behavior should be analyzed carefully ex post by authorities. Where it can be demonstrated that the shareholder's voting behavior was pivotal for the outcome of the decision of the general assembly and that the shareholder used ex ante the information about his voting decision in the awareness of the pivotal nature of his voting in the shareholders' meeting, the monopolistic nature of the decision can be argued, so that Article 9.6 MAR can be applied.

The last case is the stake-building case. The decision to stake-build can be inside information (activating the materiality test) depending on the quantity of the shares to be acquired, the number of the purchases and the liquidity of the market.¹²⁴ However, provided the

¹²² In the case of a single CEO without any doubt with 2 or more CEOs with less certainty.

¹²³ R. VEIL, T. GUMP and L. TEMPLER, 2020, *Personalbezogene Ad-Hoc-Meldungen nach Art. 17 MAR*, in *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, pp. 2, show the complexity of the problem of disclosure of inside information about personnel. This is particularly true with respect to company structures based on the two-tier system (supervisory board and management board) and with respect to the point of this article, the reasons of the material information arising from the personnel change.

¹²⁴ According to SELIGMAN, *cit.*, 1135, the SEC in the past on at least one occasion has specified that 1% triggers the materiality factor: 'It is, however, unrealistic to assume that a person acquiring less than five percent of a target while planning an attempt to control the target does not possess "material" information. Case law does not provide

monopoly-square self-insider hypothesis of this article, this case does not really present the characteristic of a monopolistic decision, because everybody on the market can decide to stake-build. For this reason, Article 9.5 MAR can always be applied.

6. Conclusions: the MAR revision and the self-insider

This article has analyzed the problem of the self-insider taking the *Cremonini* decision of the Italian *Corte di Cassazione* as well as the German relevant case law as points of reference. While in some legal systems the self-insider is acknowledged by regulation, in the US the problem of the self-insider has not been of concern. In Europe, legal doctrine has dealt with the issue during the IDD and the MAD, while with the MAR there is a consensus that the self-insider is possible but is not sanctionable because of Article 9.5 MAR. Unfortunately, Article 9.6 MAR complicates the picture giving national authorities the possibility to sanction. In this context this article has proposed a restrictive interpretation of Article 9.6 MAR, prohibiting the self-insider only if the inside information has the characteristic of a monopoly-square (monopoly²) inside information resulting in an abuse of dominant position. Even if this interpretative model presents some problems of possible application, it is an attempt to limit the scope of application of Article 9.6 MAR to a common denominator, predictable ex ante and common for the purposes of uniform application of MAR.

The current revision of the MAR can be the opportunity for rethinking the policy objectives regarding the self-insider. Apart from keeping the current confusing and unclear legal regime, there are two options given the equal access paradigm typical of European insider trading law. The European legislator can decide that the self-insider is a minor problem in the European insider trading context and for this reason can be tolerated. In this case, a reformulation of Article 9.5 MAR with a textual formulation more explicitly admitting that own decisions and intentions do not represent use of inside information would grant more legal certainty as well as the clear exclusion of Article 9.5 MAR from the application of Article 9.6. As second option, the European

numerically precise definition of materiality, but the SEC, by rule in at least one instance, has denominated the acquisition or sale of one percent of a class of stock to be “material”.

legislator may opt for a more rigid evaluation of the self-insider, either by including this behavior in the notion of inside information or by eliminating Article 9.5 MAR.

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