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Marcora for Europe:

How Worker-Buyouts Might Help Save Jobs and Build Resilient Businesses

*Tej Gonza, David Ellerman, Gregor Berkopec, Tea Žgank and Timotej Široka**

The sector of small and medium-sized enterprises is lately under immense pressure due to restrictive governmental response to the COVID-19 pandemic. One of the dominant issues is concerned with financial liquidity – the threat is large-scale insolvency, job losses in thousands, and disappearance of businesses from local communities. There is a time-tested solution in Spain and Italy that provides liquidity to such enterprises in a democratic manner by establishing employee ownership schemes. In addition to saving businesses, employee-owned firms proved to provide more resilient business structures that better withstand crises. Despite the concerns that such an aid scheme meets the indications of a general prohibition of State aid and is thus illegal, the doubts were scattered by the Commission's decision which offered guidance and clarification. Based on good practice, we propose a universal model that could be legislated in most EU Member States.

Keywords: COVID-19, SMEs, liquidity constraints, State aid, employee ownership, Marcora law, Unico law, economic policy proposal

I. Introduction

The paper addresses problem of job loss due to insolvency in small and medium sized enterprises (SMEs). The loss of jobs, personal income, tax revenues, and social programs for local communities where companies are embedded, and the dispersion of social and intellectual capital presented a challenge well before the COVID-19 pandemic. Restrictive pandemic measures that are expected to hit especially the SME sector make these issues even graver. European Union (EU) Member States and governments of other countries can and should consider a systematic approach to saving those jobs and building better businesses through worker buyouts and employee ownership. However, such State intervention raises certain questions, whether it fulfils all the conditions for the measure to fall inside the scope of the State aid rules. State aid is generally prohibited, as it can put the domestic recipient of State aid in a better position than other competitors. The latter can lead to distortions of free competition and market mechanisms. Nevertheless, State aid can also benefit the interests and objectives of the EU, which is why European legislation accepts certain forms of aid as compatible with the common market. Aid that contributes to the development and achievement of the Community's objectives is therefore an exception to the general prohibition.

The good news is that there is a time-tested model pioneered in the Italian Marcora law[1] and the Spanish Pago Unico law.[2] The idea is to allow ex-employees of insolvent businesses—or other unemployed workers—to capitalise some of their unemployment

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1 M Vieta, 'The Italian Road to Creating Worker Cooperatives from Worker Buyouts: Italy's Worker-Recuperated Enterprises and the Legge Marcora Framework' (*SSRN Electronic Journal*, 2015) <https://doi.org/10.2139/ssrn.2641057>.

2 J Lowitzsch, S Dunsch and I Hashi, *Spanish Sociedades Laborales—Activating the Unemployed: A Potential New EU Active Labour Market Policy Instrument* (Palgrave Macmillan 2017) <https://doi.org/10.1007/978-3-319-54870-8>.

benefits in a lump sum[3] to restart and usually restructure the old business in a new company, where the financial obligations of previous owners are not transferred over. Careful planning is a crucial part of the process since workers who use this option would not be able to draw on unemployment benefits for the period of time that was prepaid to them.

Typically, some additional finance is necessary and advisable from public or private sources. This means that the legal form of the new company should have a flexible structure for the outside finance and investment to be paid off by the employees over years. Herein, we suggest that the European Co-op-ESOP model, as proposed by the Institute for Economic Democracy and the European Federation for Employee Share Ownership[4] is used as the legal vehicle for investing in the new operating firm.

In this article, we propose a standardised general model to be used in the EU and in nation-states with the purpose to provide liquidity to restart insolvent businesses in a new form with socially and environmentally responsible ownership. The second section outlines the negative expectations in the aftermath of the COVID-19 crisis for the SME sector. The third section explains how government aid in the form of unemployment insurance could be restructured to establish employee-owned jobs rather than just consumption. We describe the Italian and Spanish practice and argue that a generic model should be established to be readily applied anywhere in Europe. The fourth section provides a brief history of the legal development of Marcora law in Italy. The fifth section explains that the proposed strategy would also improve the resilience of restructured enterprises. The sixth section explains some drawbacks of Marcora law due to violations of State aid rules, which were pointed out by the European Commission. We show that these concerns are not relevant today. The seventh section proposes the generic legal vehicle for Europe and generalising Marcora principles. The final section concludes and calls for government action.

II. SMEs and the Upcoming Liquidity Crisis

It is predicted that the global pandemic will have large effects on economic activity in the upcoming years. Global GDP is anticipated to drop between 6% and 7.6%,[5] while we might experience related job losses in millions.[6] Probably the most comprehensive challenges are ahead for the SME sector. SMEs are affected on the supply-side by having less access to workers (health issues and restrictive governmental measures) and on the demand side because of the drop in aggregate consumer demand. Disruption on financial markets could reduce access to credit and further limit liquidity for the cash-short SMEs.[7] Finally, enterprises that depend on global supply chains might have problems in accessing the supply of raw materials, components, parts, and other production materials.[8]

While not only SMEs face revenue loss, out of all the enterprises, they are also most susceptible to liquidity constraints as they have low cash-buffer days. In the cross-section sample of close to one million European non-financial companies in 16 countries, 20% of firms would run out of liquidity in one month, 30% in two months, and 38% in three months.[9] The report shows that after seven months, more than 50% of firms would experience solvency issues. Other recent studies confirm these findings.[10] Solvency problem means job loss. The estimation is that 'at least two of three jobs at risk are in an SME, and more than 30 percent of all jobs at risk are found within microenterprises consisting of nine employees or

3 Of a limited time period, which is up to three years in Italy and around 1.2 years of unemployment benefits in Spain.

4 The proposed legal framework of the so-called European ESOP is described in D Ellerman and T Gonza, 'A Generic ESOP Employee Share Plan for Europe' (European Federation for Employee Share Ownership, May 2020) <http://www.efesonline.org/LIBRARY/2020/A%20Generic%20ESOP%20Employee%20Share%20Plan%20for%20Europe.pdf>.

5 OECD, *OECD Economic Outlook, Volume 2020 Issue 1: Preliminary Version*, OECD Economic Outlook (OECD, 2020) <https://doi.org/10.1787/0d1d1e2e-en>.

6 International Labor Organization, 'ILO Monitor: COVID-19 and the World of Work. 5th Edition', Briefing note (International Labor Organization, 30 June 2020) <http://www.ilo.org/global/topics/coronavirus/impacts-and-responses/WCMS_749399/lang--en/index.htm>.

7 E Kohlscheen, B Mojon and D Rees, 'The Macroeconomic Spillover Effects of the Pandemic on the Global Economy' (6 April 2020) <https://www.bis.org/publ/bisbull04.htm>.

8 B Bonadio et al, 'Global Supply Chains in the Pandemic' (Working Paper, Working Paper Series (National Bureau of Economic Research, May 2020) <https://doi.org/10.3386/w27224>.

9 OECD, 'Corporate Sector Vulnerabilities during the Covid-19 Outbreak: Assessment and Policy Responses', OECD Policy Responses to Coronavirus (COVID-19) (OECD, 2020) <http://www.oecd.org/coronavirus/policy-responses/corporate-sector-vulnerabilities-during-the-covid-19-outbreak-assessment-and-policy-responses-a6e670ea/>.

10 D Chinn et al, 'Coronavirus (COVID-19): SME Policy Responses' (McKinsey & Company, 2020) <http://www.oecd.org/coronavirus/policy-responses/coronavirus-covid-19-sme-policy-responses-04440101/#section-d1e258>; A Dua et al, 'Which Small Busi-

fewer'.[11] This also means a decrease in tax revenue for the national and local governments, an increase in expenditure for social welfare, and a large psychological price behind the 'human cost'.

How to address the future crisis in the European SME sector? We propose a policy that yields a short-term solution with long-term benefits. A short-term solution means providing liquidity to companies that have the potential to continue, possibly restructured, a business operation. The idea is to transfer the good practice from Italy and Spain, where the government hands the lump-sum of anticipated unemployment benefits to the workers of failing companies if they have a good idea of how to use the capital and turn it over. The only condition to receive finance is a specific ownership structure, which ties ownership and governance rights with the employment in the enterprise. The intended positive long-term consequence is a form of business enterprise that has historically demonstrated superior resilience in times of crisis. In the next two sections, we introduce the Italian and Spanish practice and their legal status. In the fifth section, we summarise the findings that strongly indicate higher survival rates of employee-owned firms.

III. Government Aid and Employee-Ownership: Italian and Spanish Practice

If one of the greatest anticipated challenges to the SME sector are liquidity constraints, the policy goal should be the promotion of equitable models that guarantee liquidity, resilience, and social responsibility.[12] In this section, we explore the good practice from Italy and Spain and propose a generic model for the European context.

Due to specific legislation and supportive institutions, the last decade witnessed a large increase in worker buyouts of failing companies in Spain and Italy with the help of government aid. Such programs saved thousands of jobs, businesses, and local communities in the aftermath of economic crises (n 1). There are two pieces of legislation backing-up these programs: Pago Unico law (*Sociadades Laborales*) in Spain and *Legge Marcora* (Marcora law) in Italy.

The general idea is to use the anticipated unemployment benefits in a lump-sum as a buy-out or start-up capital. The recipients are either workers of insolvent companies or people already receiving unemployment benefits. The caveat is that the business enterprise that is set up or restructured becomes a partly or wholly employee-owned enterprise, which does not inherit the debts of the old insolvent company nor any other financial obligations of previous owners. A business plan needs to be professionally prepared to help ensure that the new business escapes the reasons the old business went bankrupt. In this way, the legislation in Italy and Spain not only uses the expected welfare benefits to activate or maintain jobs (instead of just consumption) but also builds socially responsible enterprises that, as we have seen in the second section, are more resilient to external shocks.

In the mid-80s, Giovanni Marcora, the Italian Minister of Trade and Industry, passed the 'Provisions for credit to cooperation and urgent measures to safeguard employment levels', which aimed to safeguard jobs and facilitate recovery of companies in crisis. The Marcora law helped to finance 258 new employee-owned companies, creating or saving around 12,800 jobs, while in the last crisis, out of 73 recovered enterprises, close to 95% were negotiated worker buyouts, negotiated through the Marcora framework.[13] Camillo De Berardinis, Managing Director of Co-operation Finance Enterprise explains that the

> [...] idea behind the law was to consider the ever increasing and huge use of forms of unemployment benefits as a diversion of resources that could instead be used to expand the production base and involve unemployed workers into a pro-

nesses Are Most Vulnerable to COVID-19--and When' (McKinsey, 2020) <https://www.mckinsey.com/featured-insights/americas/which-small-businesses-are-most-vulnerable-to-covid-19-and-when#>; G Gobbi, F Palazzo and A Segura, 'Unintended Effects of Loan Guarantees during the Covid-19 Crisis' (*VoxEU.Org Blog*, 15 April 2020) <https://voxeu.org/article/unintended-effects-loan-guarantees>; J E Humphries, C Neilson and G Ulyssea, 'The Evolving Impacts of COVID-19 on Small Businesses since the CARES Act' (Cowles Foundation Discussion Papers, Cowles Foundation for Research in Economics, Yale University, April 2020) <https://ideas.repec.org/p/cwl/cwldpp/2230.html>; J Juergensen, J Guimón and R Narula, 'European SMEs amidst the COVID-19 Crisis: Assessing Impact and Policy Responses' (September 2020) 47(3) Journal of Industrial and Business Economics 499–510 <https://doi.org/10.1007/s40812-020-00169-4>.

11 Chinn et al, 'Coronavirus (COVID-19)' (n 10).

12 Up to this point, governments have been providing aid to the business sector, while there were not enough of measures in place to guarantee that the aid is shared proportionally with those at the forefront and those that most urgently need it. For an alternative suggestion on how to use government aid to business sector in times of crisis see n 4.

13 Luca 2018 (FOOTNOTE INCOMPLETE).

ductive function through forms of co-operative self-entrepreneurship and management.[14]

In other words, use the benefits to maintain jobs rather than only for consumption.

How does Marcora conversion look like? Different scenarios grant financial access to workers who face unemployment. It can be the threat of imminent closure of a firm or succession conversion. It may be intended for a group of workers that is being threatened to be laid off and an already laid-off group of workers, which form a new cooperative. Say there is a company burdened by heavy debt liabilities that it is unable to repay due to the mid-term solvency issues. The employed workers are facing job loss, however, Marcora grants them a form of a right of first refusal – before final bankruptcy, they can step in and establish a new cooperative, which buys or leases the underlying business assets without taking over the debt of the insolvent or soon to be insolvent company.

To buy or lease the assets, workers need to form a worker cooperative that acquires part or the whole of the target company's assets. The worker cooperative is financed by share capital contributions, whereas the minimal contribution by each worker can be no less than €4,000 or €1,000 for a social co-operative. Workers usually do not have enough savings or assets to invest in the newly established worker cooperative. The Marcora law framework allows them advances on their transfer-based unemployment insurance benefit. In addition to this, workers can pursue debt capital financing, either from the cooperative sector or the institutional investors. Marcora opened the possibility of collaboration between different stakeholders involved in the process, however its main innovation is to make available the State financial support schemes aimed at activating the unemployed and potentially unemployed. Founding members receive debt or share capital through dedicated funds financed by Italian cooperatives (each co-operative contributes 3% of net annual income to the fund) and the State.[15] External financing sources, provided by the State, match the capital contribution of the workers, which they receive as the lump-sum of anticipated unemployment benefits, in ratio 1:1.

The Marcora law yielded several positive effects. It saved the jobs of workers who took entrepreneurial risk to start their own companies or buy-out the core business of existing ones. It incentivised employees to contribute their capital by conditioning the external finance to workers' shareholdings. This helped to adequately capitalise co-operatives, which otherwise often struggle with access to finance. Finally, the link between the external capitalisation and unemployment benefit provided a strong incentive for workers to make sure that enterprises were successful; between 2007 and 2013, the survival rate of a conventional Italian firm was 48.3% (after 3 years from its creation), while the employee-bought enterprises founded after 2007 had a survival rate of 87.16%.[16]

Around the same time that Italy adopted the Marcora law, Spain set up a similar scheme with the Pago Unico legislation that allows job seekers to choose to capitalise their unemployment benefits into a lump-sum in order to fund a special type of employee-owned company (*Sociedades Laborales*, or SL) or to restructure an existing conventional company into an SL. By the end of 2013, there were over 11,300 SLs in Spain, mostly SMEs, providing around 63,000 jobs. The reason for the fast growth of SLs is behind the legislation that institutionalised the special financial treatment if certain conditions are met. SLs that are registered as limited liability companies must have a minimum of three founders with no partner having above 33% of the share, while in the public SLs an individual may own up to 49% of shares. Finally, an SL must set up a special reserve fund containing at least 10% of the annual profits, however, to be eligible for special tax benefits, the percentage should be at least 25% (n 2).

While the focus of this article is on Marcora and Unico, it is worth mentioning that some other EU countries have recently experimented with similar arrangements: in France, the '*Aide à la reprise et à la creation d'entreprise*' (ARCE) scheme (where only 50% of the benefits may be capitalised), in Portugal, the 'Support Programme for Entrepreneurship and Self-Employment' (PAECPE) in 2009, and lastly a

14 Accessed on 4 September 2020 on the website <https://www.ica.coop/en/media/news/marcora-law-supporting-worker-buyouts-thirty-years>.

15 FONCOOPER is a general fund for the promotion and development of all types of cooperatives, while Compagnia Finanziaria Industriale (CFI), is a special fund to help save companies in crisis.

16 Accessed on 9 April 2020 on the website <https://www.ica.coop/en/media/news/marcora-law-supporting-worker-buyouts-thirty-years>.

similar programme was started in Bulgaria (n 2, page 89).

Italian and Spanish experience teaches us that it may be wasteful and socially irresponsible to not think about financing mechanisms that support employee buyouts of healthy cores of failing companies. Marcora is indeed not only a piece of legislation but a whole nexus of financial and consulting institutions—special cooperative funds, State funds, mutualist funds, and technical assistance organisations—developing a generic model for the European context, it would be naïve to expect the immediate development of a complex supportive environment that we can observe in traditionally co-operative Italy and Spain. Nevertheless, the point is simple; governments around Europe should think about policies that help to (i) support employment when times are rough, (ii) construct active safety nets in addition to inactive ones (passive unemployment support), (iii) maintain tax revenues and contributions to local programs by local companies, (iv) build resilient and responsible business enterprises, and (v) preserve local production.

IV. History of Legal Development of Marcora Law

Thirty years ago, the then Italian Minister of Trade and Industry, Giovanni Marcora sponsored a law to support worker buyouts in a form of an aid scheme, which aimed at supporting the growth of economic activities and employment levels through the development of cooperative companies.[17]

It was adopted as Law no 49/85 which came to be known as the Marcora law and subsequently reformed by Law no 57/2001 (Articles 12 and 17).[18] Marcora's vision was to establish the 'Italian road' to save jobs and businesses in crisis in order to help combat the excessive unemployment rates and deep recession that persisted in Italy during the late 1970s and early 1980s. Marcora recognized cooperatives to be the best organisational type for workers to participate in the management of their own businesses and the right vehicle for communities to revitalise businesses in crisis. He thought the cooperative movement could offer 'a third way' between private enterprise and public assistance. The objective of the Marcora law was to leverage the 'entrepreneurial capacities' of workers for economic and social revival.

The original iteration of this piece of legislation especially promoted the formation of cooperatives among laid-off workers, put on temporary layoff benefits (*Cassa integrazione guadagni straordinaria,* or CIGS), or that were otherwise under threat of unemployment due to business bankruptcies and closures. The current iteration of the law is now applied broadly to assist with the creation of work-generating cooperatives, work-related social cooperatives, and for the development and consolidation of established work-centred cooperatives. Moreover, and as previously mentioned, workers at risk of redundancy can now draw on and receive advances of unused portions of their unemployment insurance allowance to create new cooperatives or buy out their former places of work. The Marcora law fundamentally sets up two funds to facilitate the creation of work-generating cooperatives: Title I of L 49/1985 sets out the framework for the '*Fondo di rotazione per la promozione e lo sviluppo della cooperazione*' (also known as Foncooper), while Title II stipulates the framework for the '*Fondo speciale per gli interventi a salvaguardia dei livelli di occupazione*' otherwise known as the 'Special Fund'. Both are publicly funded pools of cash intended to stimulate the use of cooperatives for the protection of employment levels, to finance cooperative development, and for the consolidation or the formation of new employment-enabling cooperatives, including worker buyouts.

The 1990s was a decade of flux for the Marcora law framework. In view of Italy's entry into the Eurozone anticipated for 1 January 1999, in the mid-to-late 1990s, the European Commission (the Commission) carried out an infringement procedure against the Marcora law framework, considering some of its provisions too excessive and prejudicial to market competition. At the core, the Commission ruled that the capital financing made available by the State to cooperatives benefiting from the Marcora law provisions was anticompetitive and it violated the State aid rules. To 'harmonise' the law with European norms, make it less 'distortive,' and bring it more in line with 'market regulation', a revision of it was pro-

17 'The Marcora Law Supporting Worker Buyouts for Thirty Years' (11 September 2015) <https://www.ica.coop/en/media/news/marcora-law-supporting-worker-buyouts-thirty-years>.

18 'Sostegno Allo Sviluppo Delle Società Cooperative' (2021) <https://temi.camera.it/leg17/post/interventi_di_sostegno_alle_societ__cooperative.html?tema=temi/001sostegno_alle_imprese>.

posed, which would eventually see the reform of the Marcora law in 2001. In the meantime, between this period and the early 2000s, Law no 49/85 (Legge Marcora I) was increasingly put on hold and some of the promised funds to new workers buy-outs frozen as institutional investors took a wait-and-see approach to new worker buy-out projects.

V. Employee Ownership and Crisis Resilience

The topic of business resilience gained some fresh attention in the light of the current events.[19] One direction, which has not yet received sufficient attention in the mainstream business literature, is employee ownership. This section shows that thinking about alternative ownership structures as a crisis strategy – especially ownership structures that include employees as partners or shareholders of a business – might be a productive endeavour.

When the economy is on the rise, employee-owned companies on average outperform comparable businesses with conventional ownership structures. Employee Stock Ownership Plan (ESOP) companies in the US[20] generally show between 4% and 10% higher productivity relative to comparable companies with conventional ownership structures.[21] Similarly, the motivation by the workers that follow ownership leads, on average, to 2.3% greater annual sales-per-employee growth[22] and 8.8% faster overall growth.[23] A report by the McDonough School of Business indicates that ESOP companies in the US

> [...] paid their workers higher wages on average than other firms in the same industries, contributed more to their workers' retirement security, and—crucially in a year of recession—hired workers when the overall U.S. economy was pitched downward and non-S-ESOP employers were cutting jobs.[24]

Other studies from the US show similar results.

The logic is that in times of crisis, employee-owned companies will tend to do 'belt-tightening' before layoffs, not to mention closures. Studies concluded that ESOP companies relative to comparable enterprises enjoy between 20% and 50% higher survival rates on the markets during economic growth, whereas in the times of economic crises the difference increases.[25] Similar results are found with the employment fluctuation; workers in ESOP companies are 50% less likely to voluntarily look for a different job in the next year[26] and were between 20% and 50% less likely to be laid off during the 2009-2013 recession, which saved the US government around $13 billion in welfare contributions.[27] The Nuttall Review of Employee Ownership from 2012, which studied the effects of employee ownership and workplace participation in the UK, found that the employee-owned firms demonstrated increased economic resilience during the crisis; during 2008-2009, employee-owned companies showed sales growth of 11.08%, while the com-

19 A Cheema-Fox et al, 'Corporate Resilience and Response During COVID-19' (SSRN Scholarly Paper, Social Science Research Network, 23 June 2020) https://doi.org/10.2139/ssrn.3578167; T Gonza, 'Employee-Owned Firms: The Multiciplicity of Crisis, Resilience, and Social Responsibility' in *The Virus Aftermath: A Socio-Economi Twist* (1st edn, Časnik Finance 2020), 401–20; Juergensen, Guimón and Narula (n 10).

20 ESOP companies are companies that adopted a special legal structure called 'Employee Stock Ownership Plan'. ESOPs are employee ownership schemes, where shares are in a separated legal vehicle, whereas employees are the beneficiaries of the scheme. ESOPs guarantee an inclusive ownership (all workers of a given company must be included), while the buyout is financed through retained earnings of the underlying operating company not workers' savings.

21 J Blasi, D Kruse and D Weltmann, 'Firm Survival and Performance in Privately Held ESOP Companies' in *Sharing Ownership, Profits, and Decision-Making in the 21st Century* (Emerald Group Publishing Limited 2013), 109–24; A Brill, 'An Analysis of the Benefits S ESOPs Provide the US Economy and Workforce' (Matrix Global Advisors, 2012) <https://community-wealth.org/content/analysis-benefits-s-esops-provide-us-economy-and-workforce> accessed 24 July 2018; S F Freeman, 'Effects of ESOP Adoption and Employee Ownership: Thirty Years of Research and Experience' (2007); D Kruse, 'Does Employee Ownership Improve Performance?' (*IZA World of Labor*, 2016) <https://doi.org/10.15185/izawol.311>.

22 NCEO, 'Employee Ownership by the Numbers | NCEO' (2019) <https://www.nceo.org/articles/employee-ownership-by-the-numbers>.

23 B Kramer, 'Employee Ownership and Participation Effects on Outcomes in Firms Majority Employee-Owned through Employee Stock Ownership Plans in the US1' (1 November 2010) 31(4) Economic and Industrial Democracy 449–76 <https://doi.org/10.1177/0143831X10365574>.

24 P Swagel and R Carroll, 'Resilience and Retirement Security: Performance of S-ESOP Firms in the Recession' (Georgetown University, McDonough School of Business, 2010) 4.

25 M M Blair, D L Kruse and J Blasi, 'Employee Ownership: An Unstable Form or a Stabilizing Force?' (SSRN Scholarly Paper, Social Science Research Network, 8 May 2000) https://doi.org/10.2139/ssrn.142146; Blasi, Kruse and Weltmann (n 21); Kruse (n 21).

26 D Kruse, J Blasi and R Freeman, 'Does Linking Worker Pay to Firm Performance Help the Best Firms Do Even Better?' (National Bureau of Economic Research, January 2012) <https://doi.org/10.3386/w17745>.

27 NCEO (n 22).

parable conventional firms only had an average sale growth of 0.61%.

Going over to Europe, at the time when 14.73% of conventional enterprises went out of business until 2011 – most of them were SMEs - only 2.5% of cooperatives closed their doors.[28] In Italy in 2011, 68.3% of cooperatives kept the same level of employment and 18% reported an employment growth, while 12.9% of cooperatives faced job contraction. When unemployment in Italy reached 11.2%, the cooperative sector created around 36,000 new jobs between 2011 and 2012. The Italian worker-owned enterprises mostly arose out of workers' buyouts of failing companies through the Marcora scheme, which we explain below. These companies have relatively long lifespans and high survival rates, and especially so in times of economic crisis.[29]

Why are employee-owned companies generally more successful in withstanding economic crisis? A general way to understand this is that ESOPs, co-operatives, and other forms of employee-owned enterprises are primarily focused on the well-being of its workers, so the corporate policy is directed towards protecting jobs[30] and improving worker and community well-being.[31] When the 'purposes of the business are aligned with those of members [...], the results are loyalty, commitment, shared knowledge, member participation, underpinned by strong economic incentives.'[32] The counter-cyclical character of democratic firms is also linked to the 'positive externalities of workers' control and ownership of enterprises.'[33] In addition to this, such enterprises generally contribute to the prevention of 'desertification' of regions and function as 'shock-absorbers' for the needs of local communities.[34] Another important reason why co-operatives are flexible during the crisis is the ability to use profit as a crisis buffer to increase resilience.[35]

Probably the most famous workers cooperative in the world is Mondragon Corporation in the Basque region, Spain. The Mondragon Corporation is a federation of cooperatives employing close to 70,000 worker-owners. The network of cooperatives allows for crisis solidarity, for example by reallocation of workers or collective downward wage flexibilities that help to maintain employment. When general unemployment rose to 26% in Spain during the Great Recession some ten years ago, Mondragon reallocated workers from the failing cooperative enterprises and managed a collective decrease of wages between 5% and 10%, with higher positions taking greater wage cuts. In this way, the Mondragon group overcame the crisis with almost no redundancies.[36]

There are quite a few more positive factors to be considered. For example, employee-owned companies and co-operatives generally do not rely on debt capital to a degree that conventional firms do.[37] Next, research found that while conventionally structured enterprises tend to swing between two extremes when it comes to risk-taking (during the periods of economic growth, they tend to take very risky decisions, while economic crisis makes them fiscally conservative, which has adverse effects), employee-owned companies take a more long-term view and are much more consistent in their approach towards risk. Conventional companies often focus on share value and profitability, the focus of employee-owned companies is on survival, job safety, and long-term success. When workers become co-owners, they are more likely to look for options on how to cut costs, increase sales, and make their organisations more resilient in times of crisis. Solidarity is much more common in such companies, while the agency conflict is decreased, which additionally helps with worker-manager synergy and improves chances of crisis survival.

28 B Roelants et al, 'The Resilience of the Cooperative Model' (CICOPA Europe, 2012) <https://issuu.com/cicopa/docs/report_cecop_2012_en_web>.

29 Marcelo Vieta, 'Saving Jobs and Businesses in Times of Crisis' in B Roelants et al (eds), *Cooperatives and the World of Work* (1st edn, Routledge 2019), 162–87 <https://doi.org/10.4324/9780429285936-11>.

30 A Perotin, 'What Do We Really Know about Worker Co-Operatives?' in L Webster Shaw and R Vorberg-Rugh (eds), *Mainstreaming Co-Operation: An Alternative for the Twenty-First Century?* (Manchester University Press 2016) <https://www.uk.coop/resources/what-do-we-really-know-about-worker-co-operatives>.

31 D Erdal, *Beyond the Corporation: Humanity Working* (The Bodley Head 2011); D Erdal, *Local Heros: How Loch Fyne Oysters Embraced Employee Ownership and Business Success* (Viking 2008); R Oakeshott, *Jobs and Fairness: The Logic and Experience of Employee Ownership* (Michael Russell 2000).

32 J Birchall et al, *Resilience of the Cooperative Business Model in Times of Crisis* (International Labour Organization, Sustainable Enterprise Programme 2009), 12.

33 Vieta, 'Saving Jobs and Businesses in Times of Crisis' (n 29) 201.

34 Roelants et al (n 28).

35 European Observatory of Social Economy <https://www.ess-europe.eu/en/page/cooperatives-resilience-crisis-case-italy-and-spain> accessed 4 September 2020.

36 G Tremlett, 'Mondragon: Spain's Giant Co-Operative Where Times Are Hard but Few Go Bust' *The Guardian* (7 March 2013, s World news) <https://www.theguardian.com/world/2013/mar/07/mondragon-spains-giant-cooperative>.

37 Roelants et al (n 28).

VI. Marcora Law in the Light of EU State Aid Rules

The European Union's State aid rules are in place for a good reason – to level the playing field when it comes to competition between companies within the common European market, by prohibiting government support to companies. There are rules when a given type of support is deemed to fall under the State aid rules and when it does not. More precisely, Article 107(1) TFEU defines State aid through a general clause and states that

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

A more detailed definition of State aid has been developed over time in Commission and Court decisions, which have interpreted State aid broadly. A particularly important decision in the field of State aid was the decision in the *Steenkolenmijnen* case,[38] in which State aid was defined as any measure which directly or indirectly burdens a Member State, presents a particular advantage to the recipient, and is intended to achieve a specific objective which, in principle, would not be possible without that measure.

To better understand why Marcora law was first deemed to provide State aid, which was incompatible with the common market, let us first briefly describe the features that define, which government aid is deemed to be State aid:

- there has been an intervention by the EU Member State or through EU Member State's resources, which can take a variety of forms (eg, grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc);
- the intervention must not constitute general economic policy measure, such as general fiscal and monetary policy measures, but must give the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or companies located in specific regions, which means that the measure must only benefit individual companies or an individual economic sector;[39]
- there is an advantage or an economic benefit on the part of the aid recipient that would not have been granted under normal market conditions;[40]
- competition has been or may be distorted;
- the intervention is liable to affect trade between EU Member States.[41]

At the first glance, the Italian Marcora law has all the features of State aid. It represents an intervention of an EU Member State (Italy) that adopted the Marcora law (Law no 49/85), providing financial 'support' to 'companies in distress'. The selective basis of the intervention may be called into question, as Marcora law did not target specific industry sectors, specific companies, nor specific regions. Nevertheless, though the aid was intended for ex-employees of insolvent businesses and other unemployed workers, the measure appears to be limited to undertakings in some form of financial difficulty. Consequently, it did benefit individual companies that were in an 'advantaged' position because of the aid. Therefore, although at the first glance the measure is somewhat general and not selective, it is selective between the companies struggling financially and companies operating successfully. Furthermore, by giving financial 'support to companies', the competition on the common EU market may be distorted, which could in turn affect trade between the EU Member States.

Although State aid is generally prohibited, in some cases government interventions are 'necessary for a well-functioning and equitable economy',[42] which is

38 Case 30-59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECLI:EU:C:1961:2.

39 Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* [2001] ECLI:EU:C:2001:598.

40 Through practice, the Commission and the European Court have determined, which forms of State aid are incompatible with the common market. In addition to the direct payment of sums of money, State aid loans at more favorable interest rates than the market rate, reduction or write-off of receivables, decree, etc, are also defined as prohibited. See for example, Case 323/82 *SA Intermills v Commission of the European Communities* [1984] ECLI:EU:C:1984:345.

41 See for example, Case C-310/99 *Italy v Commission* [2002] ECLI:EU:C:2002:143. See also Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the TFEU [2016] OJ C 262/01.

42 Commission, 'State Aid Control' (14 February 2019) <https://ec.europa.eu/competition/state_aid/overview/index_en.html>.

a fact recognized also by the Commission. Namely, the second and third paragraphs of Article 107 TFEU regulate cases where State aid is compatible with the internal market and cases where it can be considered as such.

To answer why the original Marcora law (Law no 49/85) was considered to violate the EU State aid rules, we are going to analyse the Commission decision of 14 October 1998 on measures to assist cooperatives taken by Italy under Law 49/85 and the reasoning behind it.

To give some background history, this was not the first time the Commission assessed the Marcora law in the light of State aid rules. The Marcora law, which provided for credit for cooperative enterprises and measures to safeguard employment, had been approved by the Commission on 3 December 1986 (State aid NN 41/86) and has also approved its refinancing and extension in 1988 (State aid N 212/88) and 1990 (State aid NN 55/89).

In 1996, Italy notified the refinancing of the measure. The Commission then proceeded to open the formal investigation procedure.[43]

The Commission took issue with the Marcora law on the subject of the amount of benefits the employee receives from a wage guarantee fund and the connection between the entitlement to benefits from a wage guarantee fund and funds received from a so-called Special Fund.[44] The Commission established that only workers covered by a wage guarantee fund are effectively entitled to such benefits. The Commission also noted that the financing cannot be regarded as fully equivalent to the benefits since, there were cases where the granting of financing, owing to the payment in a single lump sum of benefits from the wage guarantee fund, gave cooperatives an advantage in as much as the amounts earmarked as capital injections are higher than the amounts usually paid to persons covered by a wage guarantee fund. The Commission also took issue with the fact that under Marcora law the workers are entitled to the benefits for three years being paid out in a lump sum in one instalment, whereas the Italian Government has not shown that all workers are entitled to the unemployment benefits for three years.[45]

In the notice, the Commission however considered that as the measures provided by the Marcora law are directly targeted towards safeguarding employment they should be examined in the light of the guidelines on aid to employment and that the scheme provided by the Marcora law comprises restructuring aid for ailing firms granted, inter alia, in the form of employment aid.[46]

On 14 October 1998, the Commission issued its decision on measures to assist cooperatives taken by Italy under Law 49/85 (Marcora law). In its decision, the Commission pointed out that the Italian Government did not comply with the Community guidelines on State aid for rescuing and restructuring firms in difficulty, meaning that the aid given under the Marcora law was considered not to be compatible with the EU common market. The Commission also took issue with the amount of co-financing provided by the cooperative finance societies (they provided for up to three times the capital subscribed by the worker members of the cooperative). In the end, the Commission declared the aid under the Marcora law to be incompatible with the common market.

However, the Commission provided a solution; if the measures provided under Marcora law would comply with the 'private investor principle'[47] and if it would comply with Community guidelines on public authorities' holdings in company capital, this would not, at least in principle, constitute State aid.[48]

As Vieta[49] points out, it was because of this decision of the Commission[50] that a reform of the Marcora law was passed, eventually leading to new para-

43 Within the Commission's assessment of the Marcora law compliance with EU State aid rules in the late 1990s, it published a Commission Notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning the refinancing and modification of the measures to assist cooperative enterprises provided for in Italian Law 47/85 ('Commission Notice').

44 '[S]pecial fund for the safeguarding of employment', is a fund intended to provide one-off, non-repayable financing to set up production and employment cooperatives. See Commission Notice (n 43) 9.1.

45 See Commission Notice (n 43) 15.4.

46 See ibid 16.2.

47 Simply put, if a rational private investor might have entered into the transaction on the same terms, having regard to the foreseeability of obtaining a return and leaving aside all social and policy considerations, this does not constitute a State aid by a public authority. Where the authority acts in a way that corresponds to normal market conditions, the transaction cannot be regarded as State aid.

48 See Commission Decision of 14 October 1998 on Measures to Assist Cooperatives Taken by Italy under Law 49/85 (1999/250/EC, Notified under Document Number C(1998) 2857) [1999] OJ L 096/0026, s V.

49 n 1.

50 To the best of the authors' knowledge, there were no more Commission cases like this at the time of writing this article.

meters of participation for the State and institutional investors in order to placate EU regulators and bring the law more in line with EU requirements for market competition and at the same time making it more flexible for the financing of other forms of work-generating cooperatives. Revising or deleting several articles of the original Law no 49/85, three major reforms to the Marcora law framework were the result, finally adopted with the Law number 57 passed on 5 March 2001 (L 57/2001):

- The grant-based financing of beneficiary cooperatives from the Special Fund was replaced by risk capital financing, where institutional investors, drawing on the State-provisioned Special Fund, must now guarantee a 'fair rate of return' on investments at reasonable rates that are meant to balance the capitalisation needs of cooperatives while minimising 'undue burdens' to the Italian State budget.
- The maximum allowable contributions from institutional investors and other financial partners of new cooperatives working within the Marcora law provisions were re-set to a 1:1 ratio with workers' contributions (ie, the lump sum of unemployment benefits that the worker receives).
- Risk capital financing was to be made available indirectly via the participation of institutional investors, limiting their participation in beneficiary cooperatives to temporary and minority shareholders and with an expanded priority given to cooperatives broadly constituted 'from firms in crisis'.

The Marcora for Europe proposal intends to finance the Marcora-style workers buyout by providing workers with unemployment benefits for six months at a time. Such funding is only provided to workers, who are or should be entitled to unemployment benefits, drawing funds from the expected right of the worker, who would nevertheless receive such unemployment benefits but in a longer time period. This solves the problem of providing the workers with a lump sum payout of unemployment benefits, to which not all workers are entitled to – payment of a three-year lump sum payment of unemployment benefits although workers could be entitled only to a few months' worth of unemployment benefits,[51] thus eliminating the State aid issue pointed out by the Commission. Such aid should not be considered as State aid at all, because although this is an EU Member State intervention, it is funded from the unemployment benefits, to which the workers are entitled, meaning it is funded from resources of workers, not from resources of a Member State. This is of course conditioned by the fact that workers are paying into a form of an unemployment insurance scheme provided by an EU Member State. However, to apply the State aid rules, all of the conditions must be met. With this, at least one of the five conditions for an aid to be identified as a State aid is not met.[52]

As already pointed out by the EU, this kind of financing could be supported by financing provided by a Member State, if the financing would follow the private investor principle or if financing is provided within the scope of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty. However, these guidelines had a limited time applicability (until the end of 2020) and did not allow grants within the meaning of our suggestion since they were aimed directly at companies in difficulty, and Marcora for Europe scheme is not necessarily undertaking in difficulty or failing. The aid is aimed at financing and rescuing the jobs, which can either mean establishing a new enterprise or rescuing the business activity of the undertaking in difficulty while not rescuing the undertaking itself.

It is in this respect that, when potentially new guidelines are to be adopted by the Commission, they should include provisions (or at least be construed in a wider sense) to offer aid not only to failing enterprise, but also to a cooperative established under the generalised Marcora for Europe scheme. Given the current crisis and based on the financial performance shown above, there appears to be a good case for accommodating some Marcora-variation. The underlying concepts should be considered by the EU and expanded to include the proposed generalised Marcora for Europe scheme.

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51 As pointed out by the Commission in indent 1 of para 15.4. of the Commission Notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning the refinancing and modification of the measures to assist cooperative enterprises provided for in Italian Law 47/85.

52 Regardless, even if all the conditions are met, the State aid may be compatible with the internal market. Also para 2 of art 107 TFEU states that aid to make good the damage caused by […] exceptional occurrences shall be compatible with the internal market.

VII. Legal Vehicle for Europe: Generalising Marcora

We suggest, for the purpose of a generic European model, that workers and managers from insolvent companies and already unemployed use a generic Co-op-ESOP model. To facilitate additional (external) finance, the new operating company should be an ordinary limited liability company (LLC), but it should wholly or partly owned by an 'employee ownership cooperative' that serves as the vehicle for the joint employee ownership of any percentage of the LLC. The use of an employee ownership cooperative as the employee-ownership vehicle is modelled after the American Employee Stock Ownership or ESOP but with some improvements to correct for some artifacts of how the US ESOP was legally implemented. The idea behind this is to completely exclude the Marcora scheme from the sphere of State aid because, although it is a State intervention, it is funded from resources of workers and their payments of unemployment insurance scheme provided by an EU Member State.[53]

The idea is to tie the central Marcora financing invention to the Co-op-ESOP legal vehicle; part or all of the re-structuring capital is provided through an advancement on the unemployment benefits for the workers who decide to buy or lease the underlying assets of the insolvent business. It is important to note that the purchase of underlying assets of the insolvent company does not mean that the debt of the insolvent company is also transferred to the LLC. With the purchase of the underlying assets, the insolvent business acquires the capital to service its debts, while the newly established LLC is debt-free. The cash from the founding workers and managers is put directly into the Co-op-ESOP and used to gain a share (say at least 51%) in the operating company, the LLC. The assets should be evaluated using some standard methods and perhaps approved by the bankruptcy legislation to avoid manipulations by the old bankrupt owners or the debtors of the insolvent company. Workers that contributed their lump-sums of unemployment benefits receive individuated ownership within the Co-op-ESOP, which owns the LLC.

The basic idea behind the US ESOP mechanism is:

1. The employee ownership is held in individual share accounts in a separate legal vehicle, the ESOP, where the shares may not be individually sold, mortgaged, or inherited in order to stabilise the ownership in the employees of the operating company;
2. The ownership that is individualised in the individual share accounts is eventually repurchased by the ESOP rather than scattered to outsiders, competitors, or heirs; and
3. Without direct cash investments from the employees, the transactions of the ESOPs (eg, to repurchase ownership shares from exiting employees) are financed by tax-favored contributions from the company to the ESOP.

But there are several ways that the generic Co-op-ESOP model makes improvements over the unnecessary artifacts of the US ESOP, which exist due to how it was initially was legally implemented:

1. The US ESOP was legally implemented by a 'carve-out' of pension law so this special type of private retirement plan could invest up to 100% of its assets in the stock of the sponsoring company. To create an ownership culture, a 'company of owners,' it is important for all employees, young and old, to see in a timely manner some palpable benefits from their ownership shares in the ESOP. But this is a problem for young employees who will only 'see some money' from their ownership when they are near retirement (the US ESOP allows some limited 'diversification' after age 55). Hence the generic Co-op-ESOP model uses the continuing stream of contributions from the company to the ESOP to start, after several years, the repurchasing of ownership shares from the older accounts on a FIFO basis which are then redistributed to the current employees usually in proportion to their salaries. It is as if the ESOP contribution from the company was the same percentage of everyone's salaries retained in the company but without payroll or social overhead taxes;
2. The US ESOP is a trust with the employees only being 'beneficiaries'—which does not fit anyone's idea of 'real ownership'—especially when the trustee is typically selected solely by management

53 And even if this financing is provided by a Member State and not employee payments, this would not, at least in principle, constitute State aid if it follows the decision of the Commission presented above.

of the company or is a representative from the trust department of a bank, which provides the leveraged financing. In the Co-op-ESOP model, the governance of the cooperative is according to the usual cooperative rules (eg, one member, one vote) and the governance of the LLC is also the standard one, where the Co-op-ESOP would have a say in proportion to its share of the total company ownership;

3. The US ESOP rarely has initial cash contributions from the employees so that employees only get shares in their ESOP accounts when the company makes ESOP contributions to the ESOP to pay off a note issued to a selling shareholder (eg, when the ESOP is used to solve the succession problem in a family-owned or other SME) or to pay off a bank loan given directly to the ESOP guaranteed by the company. The Co-op-ESOP is flexible in this regard. There might be initial cash contributions from workers capitalising their unemployment benefits, but then the Co-op-ESOP would thereafter operate based on the company's continuing ESOP contributions.

The Marcora law in Italy uses a set of quasi-public institutions established during the rich history of the post-war cooperative movement in the country. A generic model for a Marcora-type worker buyout law cannot assume such an institutional base or simply legislate it. For instance, the cooperative financial institution in Italy has a role to judge the business plans of workers who want to capitalise up to three years of their unemployment benefits to recuperate an insolvent enterprise. Hence a generic law should use a simpler system where workers can only capitalise their unemployment benefits for, say, six months at a time. Hence if they are buying the underlying assets of their now-failed previous company, it will have to be a purchase on an instalment or hire-purchase plan. And if their enterprise also fails, they do not have to wait several years to again be eligible for unemployment benefits.

The Italian Marcora law also involves a debt-financing institution to make rather soft loans to worker cooperatives starting up under the law. In the Coop-ESOP model, the operating company is a standard corporation (LLC), so standard debt-financing or lines of credit should be available as for any small business—and perhaps with some minimal tax breaks for loans or lines of credit for these recuperating enterprises could be included in the enabling legislation.[54]

VIII. Conclusion

It is expected that the pandemic and the restrictive responses by governments will push hundreds of European SMEs into liquidity problems, leading to insolvency procedures, and, eventually, to the loss of thousands of jobs.

We should be looking at more structural solutions than the current ad hoc government servicing the liabilities of existing owners. We should think about resilience and social values; employee ownership is a great tool to increase the resilience of business enterprises in times of crises, but it is also a more responsible model for workers, local communities, and the environment.

Some experts are pushing the nationalisation question back to the table. While this may be sensible in some cases, the majority of businesses facing troubles are small and medium-sized enterprises where State ownership is not an option. This article outlines the alternative: generic Marcora-type enabling legislation, which combines and improves upon the precedents found in the Italian and Spanish experience and the US experience with ESOPs, all to be applied in a European framework. Not only that the Marcora-like instrument would democratise the use of government aid to the economy, but it would also build ownership structures that are more responsible and resilient in times of crisis. Based on existing experience in Italy, it is essential to develop complementary financial mechanisms and public advisory services to aid the restructuring of European SMEs within the scope of the proposed generalised Marcora for Europe. Public services should include experts in the field of insolvency matters, company restructuring, and financial/business advisors, which are equipped with the knowledge and expertise to evaluate each intended transaction (establishing and financing of the workers cooperative and purchase of the assets or the healthy core of the insolvent company). The decision, whether the financing of the

54 The purpose of the paragraph is to provide guidance on what countries could do to encourage such aid schemes. Assessment of the allowed limits of these policies for them to be considered compatible State aid is beyond the scope of this article.

Marcora-style cooperative shall be made available, should be made on the basis of a business plan for the cooperative, which is prepared with the assistance of the public advisory services, and forms the cornerstone for establishing and financing of the workers cooperative or Co-op-ESOP.