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DIALOGUE AND DEBATE: SYMPOSIUM ON MARXIST APPROACHES TO EU LAW

The de-politicisation of decarbonisation through climate rent: a Marxist critique of the EU emissions trading system

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Abstract

The European Union (EU) Emissions Trading System (ETS) is the cornerstone of the EU's attempt to decarbonise economic production in Europe. This paper questions the power and class relations that are built into the EU's choice to address the climate crisis through the legal construction of emissions trading. Drawing on Marxist theory, the paper argues that the cost of emission allowances imposed by the ETS is a form of *climate rent*. In both the choice of this system and its implementation, the EU prioritises capital accumulation in order to protect the competitiveness of EU firms on the global market. This paper argues that the ETS thus jeopardises the progress of decarbonisation on two grounds. First, the EU's implementation of the ETS has tended to increase the economic wealth of capital by redistributing economic value away from workers and towards the capitalist class. By raising the cost of essential goods, the ETS will likely damage the reputation of climate action and thus jeopardise public support for decarbonisation. Second, the ETS is part of the EU's *indirect* approach to climate policy, which seeks to shape the actions of private capital in the direction of climate objectives. However, the severity of climate change calls instead for the use of law and public power to directly and consciously shape the rapid decarbonisation of society.

Keywords: Law and political economy; Marxist political economy; EU environmental law; EU climate law; emissions trading

1. Introduction

The EU is formally committed to taking the threat of climate change seriously, with the European Parliament declaring a 'climate and environment emergency'[1] and the Commission describing the climate crisis as 'this generation's defining task'.[2] In the European Green Deal, the Commission outlines the need for a decarbonisation of the economy through 'deeply transformative policies'.[3] At the centre of this effort to decarbonise the economy lies the EU Emissions Trading System (ETS). This market mechanism for addressing the climate crisis seeks to put an economic cost on the environmental damage of carbon and other greenhouse

[1]European Parliament resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP))

[2]The 55 per cent reduction is as compared to 1990 levels. See, *The European Green Deal: Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions* COM (2019) 640 final (Dec. 11, 2019) [hereinafter European Green Deal]; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 [2021] OJ L 243/1.

[3]European Green Deal (n 2) 4.

gas emissions. Not only is this policy the 'cornerstone' of EU climate law, but its market logic is more broadly representative of the EU's attempt to address the climate crisis.[4]

This paper offers a Marxist critique of the ETS. The theorists of emissions trading were neoclassical economists, but to understand the system, it is necessary to engage with a Marxist critique of capitalism. Through a Marxist framework, we come to understand the ETS as imposing a *climate rent* onto economic production. The ETS's attempt to pursue decarbonisation through applying a climate rent prioritises freedom of capital accumulation and, in so doing, jeopardises the progress of decarbonisation.

This work takes a different path from the existing EU legal literature on the ETS. Much of the literature is focused on improving the operation of the EU Emissions Trading System.[5] There is some critical work in the area, with concerns around financialisation and speculation particularly prominent.[6] There are also serious questions about the other environmental costs that may emerge even if carbon emissions are reduced,[7] as well as critiques of other 'flexible' mechanisms such as carbon offsetting.[8] Notable contributions to understanding the ETS have also been made by Sanja Bogojević, whose important scholarship seeks to highlight that emissions trading systems are complex legal mechanisms, not simple tools to be applied anywhere and everywhere. Bogojević, in doing this, explicitly eschews questions of 'from whom power is transferred, and on what grounds and who can challenge it'.[9] This is the point at which this Article undertakes its enquiry, questioning the power and class relations built into the EU's legal construction of an Emissions Trading System.

Section 2 of this paper offers a brief history of the ETS. It describes how the Kyoto Protocol acted as an impetus for establishing the ETS and provides an outline of the legislation underpinning the system. Section 3 then explores the roots of emissions trading systems in neoclassical economics. Influential theorists of emissions trading, such as Ronald Coase and John Dales, root their worldview in the need for economics to maximise total social value. Environmental policy should *price* pollution so that it can be assigned to the most efficient place without jeopardising the smooth operation of the price mechanism. The ETS follows this logic, seeking to achieve pollution reduction at the lowest possible cost whilst maximising economic growth through the internal market.

Section 4 outlines the Marxist framework for understanding the ETS as a form of *climate rent*. It explores Marxist theories of rent and the distribution of value between capitalists, landowners, and workers. Just as land ownership is a barrier to economic production that allows landowners to extract rent, so too is emissions pricing a form of rent created by the state. This lays the groundwork for the paper's two claims about the ETS, made in the final two sections of the paper.

[4]The description of the Emissions Trading System as the 'cornerstone' of EU climate law recurs throughout Commission documents. See, for example 'Report from the Commission to the European Parliament and the Council: Report on the functioning of the European carbon market' COM (2015) 576, p. 4.

[5]A Boute and H Zhang, 'Fixing the Emissions Trading Scheme: Carbon Price Stability in the EU and China' 25 (2019) European Law Journal 333; E Woerdman, M Roggenkamp and M Holwerda, 'EU Emissions Trading System' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* (Edward Elgar 2021) 44; B Pérez de las Heras, 'Beyond Kyoto: The EU's Contribution to a More Sustainable World Economy' 19 (2013) European Law Journal 577; A Boute, 'Phasing out Coal through Electricity Market Regulation' 59 (2022) Common Market Law Review 1007; 'Editorial Comments: The European Climate Law: Making The Social Market Economy Fit For 55?' 58 (2021) Common Market Law Review 1321.

[6]N Berta, E Gautherat and O Gun, 'Transactions in the European Carbon Market: A Bubble of Compliance in a Whirlpool of Speculation' 41 (2017) Cambridge Journal of Economics 575.

[7]S Böhm, MC Misoczky and S Moog, 'Greening Capitalism? A Marxist Critique of Carbon Markets' 33 (2012) Organization Studies 1617.

[8]H Bachram, 'Climate Fraud and Carbon Colonialism: The New Trade in Greenhouse Gases' 15 (2004) Capitalism Nature Socialism 5; L Lohmann, *Carbon Trading – A Critical Conversation on Climate Change, Privatisation and Power* (The Dag Hammarskjöld Foundation 2006).

[9]S Bogojević, *Emissions Trading Schemes: Marekets, States and Law* (Bloomsbury Publishing 2013) 2.

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The first of these claims is made in Section 5, which argues that the EU's implementation of the climate rent in the ETS has tended to redistribute value away from workers and towards capital. Based on fear of carbon leakage – that climate rent will lead to EU firms becoming uncompetitive – the EU has centred the need to sustain international competitiveness and thus the profit rates of EU firms. This choice of implementation comes at the expense of workers, who will be made to pay the pass-through cost of climate rent, resulting in their real wages falling with the rise in the price of essential goods. Thus, in its implementation, the ETS has tended to direct economic value away from the working class and towards the capitalist class. This regressive tendency is likely to damage the reputation of climate policy and undermine public support for decarbonisation.

Section 6 makes the second claim of the paper, arguing that the imposition of 'climate rent' in the ETS is part of the EU's broader approach to climate law, which leaves the power over how to decarbonise the economy in the hands of the capitalist class. Rent is the key decarbonising force, rather than more democratic and direct forms of political control over economic production. This choice results in crucial political questions about how to use our scarce available carbon being legally allocated to the abstract power of the market and the decisions of capital. Instead, climate policy should recognise that distributing our remaining carbon emissions is a profoundly political choice and that public power must be used to directly and consciously guide the process of decarbonisation in the interests of the wider population.

2. The EU Emissions Trading System

A. The Kyoto Protocol and the EU Emissions Trading System

The EU's Emissions Trading System is a 'cap and trade' scheme[10] for carbon and other greenhouse gas emissions.[11] Emissions trading systems create a legally tradable right to emit a given pollutant. The rationale is that making pollution tradeable in the market will result in the most efficient distribution amongst polluters. The concept of pollution trading schemes emerged through academic discussion of pollution control, and early versions of such trading schemes were used in the United States in the 1990s.[12]

It is through the Kyoto Protocol that the question of emissions trading was explicitly brought to Europe. This Protocol was agreed in 1997 by parties to the United Nations Framework Convention on Climate Change (UNFCCC). It represented the first successful attempt through an international agreement to establish legally binding emissions targets.[13] Article 3 established that signatories must limit their emissions to 'their assigned amounts'. Certain 'flexible' mechanisms were included to meet this target.[14] Notably, Article 17 laid out the need to set up a system for emissions trading between signatories. This would allow some parties to *exceed* their assigned amount and trade emissions with other parties to meet their target.

[10]Woerdman et al (n 5) 49 discuss the distinction between a 'cap and trade' vs. a performance standard rate trading system, noting that the EU introduces elements of the latter as well. This distinction does not impact on the analysis of the class implications of the EU Emissions Trading System.

[11]Annex II of the Directive lists the relevant emissions as 'Carbon dioxide (CO_2), Methane (CH_4), Nitrous Oxide (N_2O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), Sulphur Hexafluoride (SF6)'.

[12]See L Heinzerling, 'Selling Pollution, Forcing Democracy' 14 (1995) Stanford Environmental Law Journal 300 for a discussion of the 1990 Clean Air Act Amendments, creating a nationwide cap on sulphur dioxide emissions in the United States.

[13]A Vlachou and C Konstantinidis, 'Climate Change: The Political Economy of Kyoto Flexible Mechanisms' 42 (2010) Review of Radical Political Economics 32.

[14]Art 12 of the Kyoto Protocol outlines the 'Clean Development Mechanism', also described as 'carbon offsetting'. See T Gilbertson, 'How Sustainable Are Small-Scale Biomass Factories? A Case Study from Thailand' in S Böhm and S Dabhi (eds), *Upsetting the Offset: The Political Economy of Carbon Markets* (MayFlyBooks 2009) 57.

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Following Kyoto, the EU considered its options for engaging with emissions trading, first with Commission Communications and then with a Green Paper.[15] The prospect of creating an *internal* emissions trading scheme was considered to 'ensure that Community will be better prepared at the start of international emissions trading'.[16]

Several legal options were available in the design of such a scheme. Notably, the Kyoto Protocol envisaged emissions trading between *states*. The Commission opened up the scope of emissions trading by asking whether it should be extended to *private* entities. It was this latter option that the Commission would eventually push for, arguing that including private entities in an EU-wide scheme 'represents a unique opportunity for cost-effective implementation of Kyoto commitments'.[17] While the ETS would be limited based on sector, the scheme envisioned by the Commission would become 'the largest cap-and-trade scheme in the world'.[18]

B. The EU Emissions Trading System Directive

The EU Emissions Trading System was created by Directive in 2003 and came into force in 2005, and it has been amended by several Directives since.[19] Article 1 states that the Directive applies to all companies operating within the sectors listed in Annex 1.[20] This list of sectors, including power generation and steel works, covers an estimated 38 per cent of the EU's greenhouse gas emissions.[21] The Directive puts a 'cap' on total emissions within the system in Article 9. The cap is set in line with the Union's commitment to scale down emissions over time, with the aim of a 55 per cent reduction compared to 1990 levels by 2030 and net-zero emissions by 2050. From 2021, the cap level will be reduced by 2.2 per cent annually.[22]

All companies operating in the sectors covered by the scheme must hold an emissions permit[23] and sufficient allowances to cover all emissions at the end of each accounting year.[24] In meeting this requirement, a market is set up to facilitate the trade of allowances between

[15]Communication to the Council and the Parliament, 'Climate Change – Towards an EU Post-Kyoto Strategy' COM (1998) 353. Communication to the Council and the Parliament, 'Preparing for the Implementation of the Kyoto Protocol' COM (1999) 230. Green Paper on greenhouse gas emissions trading within the European Union COM (2000) 87 [hereinafter: Green Paper on Emissions Trading.

[16]Green Paper on Emissions Trading (n 15), 10.

[17]Ibid., 9.

[18]European Commission Directorate General for Environment, McKinsey & Company and Ecofys: 'EU ETS Review: Report on International Competitiveness' (2006).

[19]Directive (EC) 2003/87 of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32 (original ETS Directive). Directive (EC) 2008/101 of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L 8/3. Directive (EC) 2009/29 of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/62. Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2018] OJ L 76/3. Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system [2023] OJ L 130/134. Future references to "ETS Directive" refer to amended version.

[20]Notably, through recent amendments aviation is now included under the ETS, but Annex 1 of the amended ETS Directive limits the extent to which the sector is covered.

[21]This is based on figures.

[22]Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2018] OJ L 76/3.

[23]Art 4 ETS Directive requires all companies covered by the scheme to hold a greenhouse gas emission permit. There are requirements attached to this permit, notably that companies must be able to monitor their relevant emissions.

[24]Art 12(3) ETS Directive.

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companies.[25] If companies covered by the scheme fail to hold sufficient allowances, they will be penalised.[26]

A key question in setting up the scheme was *how* carbon emissions were to be allocated. In the first phase, the system worked by distributing nearly all allowances free of charge.[27] This free allowance was much criticised for handing profits to companies and for undermining the effectiveness of the scheme.[28] Over time, the ETS has moved towards a presumption of *auctioning* allowances so that companies must purchase them at a competitive market price. Article 10 of the Directive states that Member States will now 'auction all allowances' except in certain exceptional situations.

It is apparent from the Commission's description of the ETS that it is seen as the primary mechanism in the attempt to decarbonise the European economy. The Commission has used a variety of metaphors to describe the system: as 'the cornerstone' of the EU's strategy for reducing emissions,[29] as the 'central pillar' of EU climate policy[30] and, with a brief shift to nautical metaphor, the EU's 'flagship' tool for tackling climate change in a cost-effective way.[31]

3. The political economy of emissions trading

Section 3 explores the roots of emissions trading in economic theory. It highlights that the EU's own rationale for pursuing an emissions trading system follows this economic theory. Understanding the economic theory behind the ETS offers a valuable starting point for the Marxist critique of the system outlined in the remainder of this paper.

A. Coase and Dales: The political economy of pollution trading

One of the key influences on emissions trading systems is Ronald Coase's 1960 article 'The Problem of Social Cost'.[32] Based on this article, Coase has been described as the 'grandfather of pollution trading'.[33] Coase's approach to pollution trading is rooted in a worldview that argues that economic policy should aim to 'maximise the total value of production'.[34] Here, Coase bears the influence of Friedrich Hayek.[35] There should be no 'conscious control' of the economy, with governments intervening in economic production to achieve specific *aims*.[36] For both Coase and Hayek, the problem of distributing resources is solved through 'a smoothly operating pricing system'.[37]

[25]Under Art 12 ETS Directive, Member States are to ensure that allowances can be transferred between 'persons in the Union'.

[26]Art 16(3) ETS Directive. See Section 5 of this paper.

[27]Art 10 of the original ETS Directive outlined this for its first two phases of operation: "For the three-year period beginning 1 January 2005 Member States shall allocate at least 95 per cent of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90 per cent of the allowances free of charge."

[28]These critiques will be explored as part of the analysis of the redistributive nature of the scheme in Section 5 of this paper.

[29]"Report from the Commission to the European Parliament and the Council: Report on the functioning of the European carbon market" COM (2020) 740, 4.

[30]"Report from the Commission to the European Parliament and the Council: The State of the European carbon market in 2012" COM (2012) 652, 11.

[31]"Report from the Commission to the European Parliament and the Council: Report on the functioning of the European carbon market" COM (2017) 693, 37.

[32]RH Coase, 'The Problem of Social Cost' 3 (1960) The Journal of Law and Economics 1.

[33]Lohmann (n 8).

[34]The idea of maximising the value of production recurs in Coase (n 32) 6, 8, 15, 29, 42.

[35]See Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (First Edition, Harvard University Press 2018) for a discussion of Hayek in the context of the neoliberal tradition.

[36]FA Hayek, 'The Use of Knowledge in Society' 35 (1945) The American Economic Review 519, 527.

[37]See Coase (n 32) 13; Hayek (n 36) 525. Emphasis added.

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This faith in the pricing system shapes Coase's approach to pollution. Here, Coase opposes welfare economist Arthur Pigou, whose ideas were dominant in economics at the time of the 1960 article. Pigou argued that it is the government's role to impose damages or taxes on polluting firms equivalent to the cost of their pollution. This would mean that the government ensures that the true social cost of production is paid by the firm.[38]

For Coase, instead of seeing the pollution as a 'deficiency', we ought to take a reciprocal view based on the total social value. Just as some particular economic production may impose a social cost through pollution, stopping economic activity also has a social cost. Consider this Coase passage outlining a hypothetical scenario in which a factory moves into a new area. The question is whether the factory ought to pay a tax equal to the damages it has caused to the local population through air pollution:

> Without the tax, there may be too much smoke and too few people in the vicinity of the factory; but with the tax there may be too little smoke and too many people in the vicinity of the factory. *There is no reason to suppose that one of these results is necessarily preferable* . . . The aim of such regulation should not be to eliminate smoke pollution but rather to secure the optimum amount of smoke pollution, this being the amount which will maximise the value of production.[39]

Following this, Coase also differed from Pigou in how to *respond* to pollution. It is not necessarily best for the government to step in and make the polluter pay. Rather than establishing rigid rules on pollution, governments and courts should designate property rights in a way that leads pollution to be used in the most valuable way. The aim of government then should be to ensure the smooth functioning of the 'pricing system', leading to 'the employment of factors in places where the value of the product yielded is greatest'.[40]

As Bogojević has argued, Coase's work 'revolutionised' the view of pollution by seeing it as 'simply a factor of production'.[41] In contrast to Pigou's government-centred approach, Coase introduced the idea of turning pollution into a tradable legal right and 'allowing the right to pollute to be traded to the highest bidder'.[42] This is the intellectual seed from which emissions trading grew.

Coase was a key influence on John Dales, who outlined perhaps the first model for an emissions trading system in his 1968 book on water pollution.[43] Dales shared Coase's view that pollution should not be stigmatised but is instead a 'society-wide problem' to which we all contribute.[44] Dales believes there is a need for a cap on pollution, which cannot be set by economics but is instead a political question based on the level of pollution that a given society demands as the limit.[45]

Dales expands on Coase's idea of free bargaining in pollution to determine how best to meet this cap.[46] Dales argues that government authorities should cap the amount of pollution and create a tradable market for pollution permits. This creates a benefit in efficiency, with firms finding it profitable to prevent or minimise pollution to avoid paying the charge. In this, great faith is placed in the price mechanism, which will result in pollution being 'automatically . . . minimized' once it

[38]A Pigou, *The Economics of Welfare* (Palgrave Macmillan 2013).

[39]Coase (n 32) 42. Emphasis added.

[40]Ibid., 40.

[41]Bogojević (n 9) 5.

[42]Ibid., 150.

[43]J Dales, *Pollution, Property & Prices: An Essay in Policy-Making and Economics* (1st edn, University of Toronto Press 1970) 111 cites the influence of Coase's 1960 Article (n 32) on his book.

[44]Ibid., 101.

[45]Ibid., 99.

[46]*Id.* at 84 dismisses general regulation of firms mandating reduction as unfair, and specific regulation of firms as unfeasible.

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becomes a cost to producers.[47] For Dales: there is 'no doubt that this scheme is the most efficient, ie, the least costly, way' to implement a pollution reduction policy. Dales recognises the potential for extending such a scheme beyond water to 'any anti-pollution policy that you or I can dream up'.[48] Written in 1968, the scheme outlined in Dales' book resembles the EU Emissions Trading System, which would emerge 40 years later.

Overall, we can view emissions trading in an economic theory that seeks to assign maximum freedom to market operators in the belief that the price mechanism will maximise total social value. Pollution ought to be made into a tradeable legal right so it can be efficiently distributed using the market mechanism.

B. 'Low cost' emission reduction and the maximisation of total social value: the political economy of the EU Emissions Trading System

The EU follows the same underlying logic of Coase and Dales' economic theory in its rationale for choosing an emissions trading system as the cornerstone of its climate law and policy. This is evident in the Commission's emphasis on the 'cost-effective' nature of the ETS, as can be seen in Article 1 of the Directive establishing the system:

> This Directive establishes a scheme for greenhouse gas emission allowance trading within the [Union] . . . in order to promote reductions of greenhouse gas emissions in *a cost-effective and economically efficient manner*.[49]

This emphasis on *low cost* has been consistent in EU environmental policy since the early 1970s. From its first environmental action programme in 1973, the Commission emphasised the need to achieve environmental protection 'at the lowest cost to the community'.[50] And today still, with the EU explicitly addressing the climate crisis in the European Green Deal, decarbonisation is to be achieved 'at the lowest possible cost'.[51]

Why this emphasis on low-cost achievement of environmental goals? Like all interventions into economic production, environmental policy is a potential *barrier* to trade and free competition and, thus, a threat to the smooth functioning of the price mechanism. Therefore, rather than following Pigou's approach, in which pollution ought to be remedied, the Commission's focus on low cost bears the influence of Coase. Environmental protection is a policy goal, but it must be conducted in a way that causes minimal damage to the overall maximising of total social value.

This view of economic policy intersects with the centrality of the internal market in the EU's imaginary. Early EU action on the environment was partly motivated by the need to ensure a 'level playing field' for the internal market, with the Commission noting that 'very divergent national policies' on the environment might affect 'the proper functioning of the common market'.[52] Common environmental standards, set through positive integration, aided the development of the internal market by removing trade barriers to imports at national borders.

The internal market seeks to maximise total social value in the EU economy, and this is often articulated through the lens of increasing economic growth measured by Gross Domestic Product (GDP). For example, the EU's 2020 Single Market Strategy describes the 'benefits of removing

[47]Ibid., 92.

[48]Ibid., 100.

[49]Emphasis added.

[50]Programme of Action of the European Communities on the Environment, European Commission, 1973 O.J. [hereinafter 1st Environment Action Programme].

[51]European Green Deal (n 2) 6.

[52]Action Programme of the European Communities on the Environment (1982 to 1986), European commission [hereinafter 3rd Environment Action Programme].

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remaining barriers to a fully functioning single market', resulting in an approximately 12 per cent boost in GDP.[53]

Thus, environmental policy must be conducted *in line* with economic growth. For example, the Commission describes the European Green Deal as a 'new growth strategy'.[54] Growth is to be achieved through increasing market competition by minimising potential barriers to trade and, thus, potential costs to the economy. For the Commission, both 'the attainment of Union-level climate and energy objectives' and '*increased* competition' are needed.[55]

As part of this low-cost approach, market mechanisms came on the Commission's radar in the early 1990s as a way to achieve pollution at the lowest possible cost. In its fifth environment action programme written in 1993, the Commission describes the method of market-based environmental policy as 'to get the prices right and to create market-based incentives for environmentally friendly economic behaviour'.[56]

After Kyoto put the question of emissions trading on the agenda, the Commission played an 'extraordinarily strong role'[57] in the creation of the ETS. The need for environmental policy to intersect with the internal market and continued economic growth was central to this question.[58] The potential for emissions trading to create more *barriers* to trade was part of the impetus for the Commission to respond to Kyoto with the push towards an EU-wide Emissions Trading System. In a 1998 discussion paper on implementing Kyoto, the Commission discussed the need for a single price for emissions across Europe to avoid discrimination between national prices.[59] By 2000, the Green Paper on the Emissions Trading System stated that emissions trading must 'avoid creating barriers to trade, restrictions to the right of establishment of companies and distortions of competition which would damage the internal market'.[60]

The Commission follows the same logic as Dales in outlining *why* an emissions trading scheme is the low-cost option. Emissions reductions are incentivised for companies because a *price* is placed on the emission. Companies that find reducing emissions easier and thus cheaper can sell their allowances to those for whom reduction would be more onerous and, therefore, expensive. According to the market's model, this leads to the most efficient allocation of emissions, with reductions achieved at the lowest possible economic cost to society. Over time, the increased cost will discourage harmful emissions and incentivise greener forms of economic production.

[53]*Communication to the European Parliament, The Council, The European Economic and Social Committee and the Committee of The Regions Identifying and addressing barriers to the Single Market*, European Commission COM (2020) 93 final (Mar. 10, 2020) (hereinafter Single Market Strategy 2020).

[54]European Green Deal (n 2) 2.

[55]There is focus on the energy policy of the Union, and the possibility for the EU to become a world leader in 'green' technologies. The EU stresses the economic advantages of being the 'first mover' in the field of renewables resulting in 'competitive advantage'. See, Commission, *A Clean Planet for all A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy* COM (2018) 773 final (Nov. 28, 2018) (hereinafter A Clean Planet for All). Emphasis added.

[56]Towards Sustainability: A European Community programme of policy and action in relation to the environment and sustainable development, European Commission, 1993 O.J [hereinafter 5th Environment Action Programme].

[57]J Wettestad, 'The Making of the 2003 EU Emissions Trading Directive: An Ultra-Quick Process Due to Entrepreneurial Proficiency?' 5 (2005) Global Environmental Politics 1, 2.

[58]Initial legislation on environmental protection was impacted by reliance on the internal market legal basis, but environmental protection would gain its own Treaty base following the Single European Act 1986, with an amendment that this was to be passed through qualified majority voting in the Maastricht Treaty 1992. On this development, see generally I von Homeyer, 'The Evolution of EU Environmental Governance' in J Scott (ed), *Environmental Protection: European Law and Governance* (Oxford University Press 2009) 15; F Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' 18 (2006) Journal of Environmental Law 185.

[59]'Communication from the Commission to the Council and the European parliament: Climate Change – Towards an EU Post-Kyoto Strategy' COM (1998) 353.

[60]'Green Paper on greenhouse gas emissions trading within the European Union' COM (2000) 87, p. 12.

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The ETS fits the Commission's general desire for 'increased competition' between market actors by deepening the internal market.[61] This will allow the market, the price mechanism, to function fully. In this schema, political intervention in economic production harms both market and environmental goals. The market must be clear and undistorted to offer 'long-term signals to guide investors' towards economic growth and a low-carbon future.[62]

4. Charging a climate rent – The EU Emissions Trading System's intervention into economic production

Thus far, the paper has outlined the operation of the ETS and its underlying political economy. From here, the paper shifts to applying a Marxist framework of understanding to the ETS, based on an analysis of class and rent. Section 4 offers the Marxist political economy account of rent based on the distribution of value between classes of capitalists, landowners, and workers. It then outlines how Marxists have analysed emissions trading as a form of rent.

In Marxist political economy, rent is understood in relation to the three basic classes in production: capital, labour, and landed property. Productive activity comes from the collaboration of capital and labour. Capitalists unite the means of production (machines, computers, etc) with labour-power (workers hired through wage labour) to create economic value. Capitalist firms take more economic value from the workers than they pay them in wages. This extra value taken from labour by capital is *surplus value*, and in a holistic sense, it is how capitalist firms receive *profit*.[63]

Landed property is a necessary feature of the capitalist mode of production, moving beyond the non-economic ties to the land typical of pre-capitalist social relations.[64] But this existence of landed property impacts the division of economic value, with the landlord able to extract a share of value from the production process. This is because business requires land – *a place* – to conduct economic production. Whether this be a factory or an office space, it is necessary to have somewhere to combine the means of production with labour power.

Thus, while landed property is necessary for capitalist production in general, it is also a constant *barrier* to the individual conduct of economic production. If a firm wants to conduct its business, it will need to overcome this barrier to production by paying rent to the owner of the land.[65] The landowner takes that rent from the share of *surplus value* created by the worker, i.e., the extra labour that the worker performs but for which they are not paid.[66] Even the least productive land can extract an absolute rent, which becomes the baseline from which different rates of rent are calculated.[67]

[61] *A policy framework for climate and energy in the period from 2020–2030*, European Commission COM (2014) 15 final (Feb. 3, 2014) (hereinafter Commission policy framework for climate and energy 2020–2030).

[62] Commission, *A Clean Planet for all A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy,* COM (2018) 773 final (Nov. 28, 2018) (hereinafter A Clean Planet for All).

[63] K Marx, *Capital: A Critique of Political Economy v. 1* (Ben Fowkes tr, Penguin Classics 1990) 251. This base wage rate is the cost of the material reproduction of the worker.

[64] K Marx, *Capital: A Critique of Political Economy v. 3* (David Fernbach tr, 3rd edn, Penguin 1992) 754: the 'expropriation of the mass of the people from the land . . . is a historical precondition for the capitalist mode of production'.

[65] Note, where capitalists buy this land themselves rather than leasing it, this would mean that they would take a on a dual-class role of both landowner and capitalist. They have paid the cost for purchase, and this could be seen as then renting that business back to themselves.

[66] Marx (n 63) 251.

[67] Different locations can lead to different amounts of rent. This is known as *differential rent* and is based on the quality of economic value that can be created on the land. For example, an office block might be in a good location for access to labour power, or in agriculture a certain land might be more fertile. Marx (n 64) Chapters 38–44. For those curious as to why 'absolute rent' exists, and why the worst land does not yield in rent, the answer is that, while '[l]egal ownership of the land, by itself, does not give the proprietor any ground-rent It certainly does give him[sic] the power, however, to withdraw his land from cultivation until economic conditions permit a valorisation of it that yields him a surplus'. Thus, landowners will keep land uncultivated unless it can produce a rent for them. See Ibid., 891.

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Ultimately, while the capitalist is producing value through combining labour-power with the means of production, the landlord is simply skimming an absolute rent off the final sale of the product. As Marx put it:

> Landed property has nothing to do with the actual production process. Its role is limited to transferring a part of the surplus-value produced from capital's pocket into its own.[68]

Marxist political economists have conceptualised emissions trading as a type of 'climate rent'.[69] In contrast to accounts which centre the idea of emissions trading as a new form of value and profit in the economy,[70] Romain Felli argues that emission trading simply creates a new form of rent. The cost of emissions is skimmed from the economic value created during the capitalist production process and taken by the state.[71]

To create climate rent, the ETS creates a barrier to economic production for the sectors listed in Annex 1 of the Directive. For these sectors, a greenhouse gas emissions permit is required to conduct economic production. Companies must have sufficient allowances to cover their emissions at the end of each accounting year.[72]

The ETS, then, is a *barrier* to economic production for the areas it covers. This is the state using its ability to mediate the access of capital to nature.[73] This barrier can be overcome only by purchasing 'allowances'. A price attaches to these allowances, based on an open market, which is the climate rent each operator must pay. The state grants itself monopoly rights over permission to emit carbon through economic production in its territory.[74] For the sectors covered by the ETS, we can say that emission permits 'have legally become a necessary condition of production' in the EU.[75]

Strict penalties for non-compliance reinforce this barrier to production. Article 16 of the Directive lays down penalties, which are to be enforced by Member States and must be 'effective, proportionate and dissuasive'. The 2008 Directive established an excess emissions penalty of 100 Euros, pegged to inflation, for each tonne of carbon dioxide equivalent emitted.[76] Thus, the ETS is indeed a barrier to production, where non-compliance leads to even greater charges to business.

We can understand climate rent as an 'absolute rent': a baseline price that must be paid.[77] It is a portion of the value produced through the production process that must be handed over to the state. In this, we should recognise that emissions rights, like land, are not made in a capitalist production process and do not *add value* to the economic process. Instead, purchasing an emissions right is a precondition for engaging in economic production. So, what is being purchased is not a real and tangible commodity; instead, the purchase is the payment of rent to remove this 'state-constituted barrier to economic production'.[78]

Rooted in this analysis of climate rent, the final two substantive sections of this paper offer a critique of the EU Emissions Trading System. Owing to its prioritisation of freedom of capital to continue accumulation, the ETS jeopardises the progress of decarbonisation in two key ways.

[68]Marx (n 64) 960.

[69]R Felli, 'On Climate Rent' 22 (2014) Historical Materialism 251; A Vlachou, 'Nature and Value Theory' 66 (2002) Science & Society 169; P Jones, 'Saving the Planet or Selling off the Atmosphere? Emissions Trading, Capital Accumulation and the Carbon Rent' [2009] Marxist Interventions 9.

[70]K Matthews and M Paterson, 'Boom or Bust? The Economic Engine behind the Drive for Climate Change Policy' 17 (2005) Global Change, Peace & Security 59.

[71]Felli, 'On Climate Rent' (n 69).

[72]Art 12, ETS Directive.

[73]Vlachou, 'Nature and Value Theory' (n 69).

[74]Jones (n 69) 19.

[75]Felli, 'On Climate Rent' (n 69) 269.

[76]Art 16(3) ETS Directive.

[77]Marx (n 64) 891.

[78]Felli, 'On Climate Rent' (n 69) 273.

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Section 5 argues that the ETS tends towards a regressive redistribution of wealth and is thus likely to damage public support for climate action. Section 6 argues that the ETS leaves the power over decarbonisation in the hands of the capitalist class rather than using public power to consciously and directly shape rapid decarbonisation.

5. Distribution of climate rent: the importance of 'carbon leakage'

Section 5 will analyse how the implementation of climate rent in the ETS impacts wealth inequality. In this, it is necessary to clarify that while climate rent is a crucial concept for understanding the ETS, attaining the rent is not the initiative's aim. Instead, the system aims to render carbon-intensive activity more expensive and thus less competitive. Over time, the scheme aims to encourage the competitiveness of less carbon-intensive production. However, this Section argues that the implementation of the ETS in the Directive has tended to deepen wealth inequality.

In exploring the question of wealth redistribution, Marxist analysis focuses not on society as a collection of self-interested individuals but rather on wealth distribution amongst classes. Bearing in mind the division of value in society between capital and labour, and with a focus on climate rent, we can note that a new form of rent is being added to the production process and ask three questions: who is to *pay* the rent? Who is to *collect* the rent? And for *what purpose?* Based on this analysis, this Section claims that the implementation of the ETS has tended to transfer value from workers to the capitalist class.

A. Who is to pay the climate rent?

Under the Emissions Trading System, the explicit aim is that the climate rent is to be paid at the point of consumption where possible. Because the Union wishes to maintain international competitiveness for EU firms, it is essential that profit rates – the share of value accruing to capital – are not dented. This centring of competition is evident in the Commission's initial proposal for the ETS Directive, which describes the system as having a dual goal: 'first, an instrument for environmental protection, and, second, one of the policy instruments that will impair competitiveness the least'.[79] This aim for competitiveness centres on the need to ensure 'pass-through cost' or that the climate rent is to be passed through to the point of consumption.[80]

The need for pass-through cost is justified on the grounds of 'carbon leakage', a concept that has been common since the EU's earliest discussion of setting up a carbon trading scheme. A 1997 Commission Communication written in the run-up to Kyoto negotiations notes that climate policy comes with the risk that:

> Energy-intensive industries would relocate to outside the EU. Moreover, energy consumption in the EU might fall but rise elsewhere (since global energy prices would fall). As a result carbon dioxide emissions in the rest of the world would increase (carbon leakage) which would partially undo the efforts of the EU to reduce global emissions.[81]

This idea of carbon leakage has both environmental and economic dimensions. Economically, the EU fears that its firms operating in a context of 'global competition where relatively small cost

[79]Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2002] OJ C 75 E/33.

[80]Pass through cost is a recurring concept and is mentioned in the text of the ETS Directive itself. For example, Art 10b ETS Directive states that sectors not subject to carbon leakage 'are considered to be able to pass on more of the costs of allowances in product price'.

[81]Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of The Regions Climate Change COM (97) 481, 15.

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margins are important' will be outcompeted by firms not subject to a climate rent.[82] Environmentally, the externality of the carbon emission still exists and has not been internalised because the company is beyond the EU's jurisdiction.

The way that the EU seeks to avoid carbon leakage is to focus on 'pass-through cost', where the climate rent can be passed through to the point of consumption. Holding other things equal, this means a fall in real wages for workers, as the prices of essential goods and services rise. On this basis, the Emissions Trading System begins with a regressive tendency, lowering the worker's share of value. But this share of value depends on who collects the rent and what they do with it.

B. Who collects the climate rent?

Thus far, we have seen that the EU has legally created a climate rent through the ETS and seeks to make the customer pay for this rent. But there is still the question of *who* collects that rent and why. In the first phase, the EU and its Member States did not seek to collect this rent. The system put a price on carbon but distributed nearly all allowances *free of charge*. However, this did not mean that no price attached to carbon. Because carbon was saleable on the market, the use of carbon came with an 'opportunity cost'. Companies factored in the 'missed sale revenue' from using, rather than selling, the emissions allowances.[83] Because of this, firms included the cost of carbon in their production costs and priced them accordingly.

This gave rise to the phenomenon of windfall profits. Companies in less competitive markets passed on nearly all the market price of carbon through to the customer, even though they did not have to pay that price themselves. The result, especially in the energy sector, was 'increased profitability' for the industry, with one report describing this as a 'direct transfer of value from electricity consumers'.[84] Thus, we can summarise this early phase of the ETS as the EU creating a climate rent, which was then collected by capital as excess profit, thus deepening wealth inequality.

Free allocation was not intended to be permanent for all sectors included in the Emissions Trading System.[85] This is because some firms can pass through the cost of climate rent to the customer without losing a competitive edge because they are in 'monopolistic or oligopolistic markets'.[86] Because price setting is less determined by economic competition, the climate rent can be passed through.[87]

In its amended form, Article 10 of the ETS Directive now creates an auctioning system for 'all allowances' that are not allocated free of charge owing to other rules in the Directive. Free allocation is now specifically for firms at risk of carbon leakage, as designated on the 'carbon leakage list'. The most recent version of this was published in 2019 and runs for Phase 4 of the ETS from 2021–2030. Companies are included on this list on the rationale that they cannot pass on the costs of the carbon price because they are competing with companies that are not subject to a carbon price.

One way in which the EU is seeking to increase the rent gained through the Emissions Trading System is via a Carbon Border Adjustment Mechanism. This Regulation, set to enter into force by 2026, would aim to avoid carbon leakage by ensuring that imports also must pay the climate

[82]Ibid., 18.

[83]Woerdman et al (n 5) 51.

[84]Report by IPA Energy Consulting for the UK Department of Trade and Industry (2005), 'Implications of the EU Emissions Trading Scheme for the UK Power Generation Sector' <https://webarchive.nationalarchives.gov.uk/ukgwa/20090609023322/http://www.berr.gov.uk/energy/environment/euets/phase1/page26230.html> accessed 2 December 2024.

[85]Art 30(c) of the original ETS Directive states that a move to auctioning is part of 'Review and further development'.

[86]European Commission Directorate General for Environment, McKinsey & Company and Ecofys: 'EU ETS Review: Report on International Competitiveness' (2006), p. 13.

[87]Woerdman et al (n 5) 56. This is the case, for example, with power generation companies which 'do not compete on an international product market, so they can pass on most of their carbon costs to electricity consumers'.

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rent.[88] Companies currently at risk of carbon leakage and awarded allowances for free could then be made to pay for allowances at auction, thus increasing the available rent. But even if this greater amount of rent is charged, it will still be passed through and paid at the point of consumption, with the risk of an economically regressive effect. The key question here is what will be *done* with the collected climate rent.

C. The use of climate rent: the regressive tendency of the EU Emissions Trading System

So far in its operation, the ETS has tended towards a regressive economic effect. But with the move towards auctioning, Member States may collect more rent and could then use the climate rent for progressive means, but this 'depends on how the state spends the additional revenue it raises'.[89] The ETS Directive itself does not contain provision to progressively redistribute the rent costs that have been passed through to workers. When it comes to the question of how to *spend* rent, the ETS Directive has other priorities.

Carbon leakage emerges again in how Member States are instructed to spend the climate rent. In the amended Directive, the Commission instructs Member States to adopt financial measures for sectors exposed to carbon leakage risk.[90] The implication of these policies is that the carbon rent is not passed through to the customer and has been absorbed by the company. So, to maintain profit rates, the collected rent must be returned to the company. In this instance, the policy may not impact the distribution of value between labour and capital.

Where pass-through cost is successful, and there are no concerns of carbon leakage, the Directive does give guidance on how Member States are to spend their rent collected from auctioning. Article 10(3) of the Directive contains instructions on using the 'revenues generated from the auctioning of allowances', with at least 50 per cent to be used for investments related to climate change. However, this long list shows no concern for redistributing value to workers. In this sense, the Directive encourages the taking of value *from* workers, collected through climate rent at the point of consumption, as the way to fund climate investments.

It is possible that the climate rent could be used for more progressive ends. If the wealthy tend to consume more carbon and pay more carbon rent, then if *all* the carbon rent was used to support the living standards of workers, this could have a progressive outcome, lessening wealth inequality. For example, the rent could be used to decommodify universal public services. This would *increase* workers' real wages by reducing basic costs. More elaborate schemes, such as a 'cap and share' scheme, have also been proposed.[91] This would involve sharing the funds received from climate rent to the population. Again, this could increase worker share of value, with those who own or manage the means of production paying a higher amount of rent, but the distribution equal to all.

However, instead of these proposals, the implementation of the ETS has tended to be regressive, taking value away from workers and ensuring capitalist profit rates at every stage. The carbon price will increase the cost of the essential goods everyone needs to purchase, including food, transport, and home energy. The cost of *basic* products rises because they are already at cost price. The implementation of the ETS supports Peter Jones's claim that there is a 'logic of worker's sacrifice' built into emissions trading. Workers have 'little choice but to consume higher quantities of carbon-intensive goods'.[92] And yet, it is the policy of the ETS to raise the cost of these goods through climate rent and to have that cost borne by the workers.

[88]Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L 130/52.

[89]Jones (n 69) 17.

[90]Art 10a (6) ETS Directive.

[91]Feasta, Cap & Share: A Fair Way to Cut Greenhouse Gas Emissions, <http://www.feasta.org/documents/energy/Cap-and-Share-May08.pdf> accessed 2 December 2024. This idea received some traction in the early 2010s, but is currently out of fashion.

[92]Jones (n 69) 21.

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More recently, there has been evidence that the EU may engage in some redistribution of climate rent. Notably, the EU is committed to a 'just transition mechanism', which targets support for people and companies in regions where there is structural change due to the decarbonisation of the economy 'because they depend on fossil fuels or carbon-intensive processes'.[93] Thus, to the extent that this scheme may be redistributive, we can see it as separate from the broader tendency of the ETS to increase the costs for *all* workers in *all* regions, regardless of their relation to the fossil fuel industry.

More relevant to the potential for redistribution of climate rent is the EU's Social Climate Plan. This Regulation, passed in May 2023, recognises that the ETS tends to deepen wealth inequality:

> The increase in the price for fossil fuels can disproportionally affect vulnerable households, vulnerable micro-enterprises and vulnerable transport users who spend a larger part of their income on energy and transport, who, in certain regions, do not have access to alternative, affordable mobility and transport solutions, and who may lack the financial capacity to invest in the reduction of fossil fuel consumption.[94]

This offers the potential for mitigating some of the extent to which the ETS deepens wealth inequality. This Regulation instructs Member States to submit 'Social Climate Plans' to address the potential for energy and fuel poverty resulting from the implementation of the Emissions Trading System. In this, the Commission explicitly envisages that 'part of the revenues' from the ETS – the climate rent – will go towards the fund.[95]

Through this Regulation, the EU now appears to be addressing the issue of redistributing climate rent. This may mitigate, or even correct, the ETS's tendency to deepen wealth inequality. However, this will depend on the details of the social climate plans and where and how the funds are targeted. Further, the extent to which these funds are redistributive will vary between Member States, with each submitting its own social climate plan.

Overall, the tendency of the ETS so far has been to transfer wealth away from workers and towards the capitalist class. The windfall profits of the first phase of the ETS were a regressive transfer of wealth, with increased costs for workers and increased profits for capital. More generally, the default position of the ETS is to deepen wealth inequality by passing through increased costs of basic goods to workers. The ETS Directive itself created no provisions for redistributing the climate rent to mitigate the regressive effects of the system, and this will only potentially change by 2026 with the coming into force of the Social Climate Plan Regulation. This regressive tendency is likely to damage the reputation of climate policy and jeopardise public support for decarbonisation.

A Marxist analysis is essential to show why this regressive effect came about and why it may persist. The competitiveness of EU firms in the global market continues to be a central concern of future EU climate law and policy, with concerns of carbon leakage when adding costs to capitalist production. The *use* of climate rent can ameliorate this regressivity problem to some degree, but this also runs up against limits. First, there are competing sources for how rent revenue is to be used, not least from the need for climate investments.[96] Second, Eurozone policy restricts the ability of Eurozone Member States to engage in spending to lessen the regressive tendency of the ETS.[97] These tensions and questions will likely persist in the coming years as the carbon price rises.

[93]European Green Deal (n 2), p. 16.

[94]Recital 11, Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 [2023] OJ L 130/1.

[95]Ibid., Recital 12.

[96]See D Gabor, 'The (European) derisking state' [2023] *Stato e mercato* 53 on the emphasis of public climate investment to support private investment.

[97]Indicatively, see M Adams, F Fabbrini and P Larouche (eds), *Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014).

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6. The class implications of de-politicising decarbonisation

So far, we have established that the ETS has tended to redistribute value away from workers and towards capital. But even if the system is implemented with more of a focus on progressive redistribution of climate rent, there is another fundamental question about the ETS's method of decarbonisation. The second claim of this paper is that, as a mechanism, the ETS leaves the power over *how* to decarbonise economic production in the hands of the capitalist class. This is part of a broader EU climate strategy, which focuses on the direction of private investment towards climate objectives. This approach jeopardises the progress of decarbonisation by only addressing climate policy *indirectly* rather than using public power to consciously and directly guide the process of decarbonisation.

A. Emissions trading as the de-politicisation of environmental policy

To understand the EU's climate law and its cornerstone, the EU Emissions Trading System, we must engage with an analysis of de-politicisation. As it is used here, de-politicisation refers to the construction of mechanisms of power that are isolated from popular control. Of course, de-politicisation does not mean that the issue ceases to be political. Rather, when matters are de-politicised, they are often *presented* as technical, neutral and apolitical.[98] This presentation obscures the removal of political decisions from popular control.

As discussed in Section 3, the key theorists of emissions trading believed that the environment is best protected by assigning an economic value to pollution and creating a market to efficiently distribute that pollution. By assigning this power to a market mechanism, emissions trading de-politicises environmental policy by removing it from the direct sphere of democratic politics.

This tendency to de-politicise is not a *retreat* by the state but rather a shift in the role that it plays in relation to capital accumulation.[99] The state uses law to maximise the freedom of economic production by encasing it from democratic politics.[100] It sets the conditions for the smooth operation of the price mechanism, taking on a more technical role of successfully managing the economy, measured by economic metrics such as investment and economic growth.[101]

The rationale for this is clear in the view of economists such as Hayek and Coase; the free operation of the price mechanism is the best method of distributing society's resources. Economic planning is best done by the capitalist class in pursuit of profit and under market conditions.[102] Legal and political intervention in economic production should be limited as it will only interrupt the operation of the price mechanism. As Romain Felli describes, these thinkers aim to

[98]There is an extensive literature on the EU's tendency to depoliticise, see M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' 21 (2015) European Law Journal 572; P Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013); W Streeck, *How Will Capitalism End?: Essays on a Failing System* (Verso 2016); MA Wilkinson, 'Political Constitutionalism and the European Union' 76 (2013) The Modern Law Review 191; R Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019).

[99]Indeed, this has come with a legalisation of areas that were previously not within the remit of the state. See R Knox, 'Law, Neoliberalism and the Constitution of Political Subjectivity: The Case of Organised Labour', in H Brabazon (ed.) *Neoliberal Legality* (Routledge 2016) 27, which highlights how the neoliberal state intervened in industrial relations, a matter previously governed by collective agreements.

[100]Slobodian (n 35); R Knox, 'Against Law-Sterity' 6 (2018) Salvage 49.

[101]W Brown, 'Neo-Liberalism and the End of Liberal Democracy' 7 (2003) Theory & Event 15. As M Bartl has argued, the Commission addresses itself to these technical indicators of legitimacy, see M Bartl, 'Internal Market Rationality: In the Way of Re-Imagining the Future' 24 (2018) European Law Journal 99; Bartl (n 98).

[102]For Hayek, planning is: 'the complex of interrelated decisions about the allocation of our available resources. All economic activity is in this sense planning'. See FA Hayek, 'The Use of Knowledge in Society' 35 (1945) The American Economic Review 519, 520.

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'systematically exclude authoritative decisions over the content of the goods and services produced'.[103]

The ETS is part of a de-politicised approach to decarbonisation. A cap is set on emissions to encourage the scaling down of carbon usage in economic production. However, the allocation of our limited remaining carbon emissions is left to the market. As we have seen, this is based on a rationale that the price mechanism will distribute these resources most efficiently. This is not an *absence* of state action. Rather, it is strong state involvement, specifically geared towards the legal construction of markets and maximising the freedom of capital within that market.

B. Emissions trading and capital's power over economic production

The Emissions Trading System maintains the 'unequal power relations' of our existing model.[104] To understand this, we must analyse the relationship between capital and the mobilisation of social labour, making a distinction between *particular capitals* and *capital-in-general*.[105] On the one hand, capital 'only exists in the form of particular capitals', and these capitals are in competition and conflict with one another. On the other hand, to understand the dynamics of a capitalist society, it is necessary to have regard to the concept of *capital-in-general*: 'the total social capital that is available to mobilise labour-power in the production of surplus-value'.[106] Thus, while capital only ever exists as particular capitals, we can understand that the capitalist class as a whole has the power to direct the social labour of society as a whole.

This collective labour power, the productive activity of the vast majority of the population, is under the control of the capital. This labour-power has the potential to bring about the structural transformation necessary to move towards reproducing society in an ecologically sound manner and without the use of fossil fuels. However, under capitalism, society's labour power is subordinated to capitalist control and the search for profit.[107] While social benefits can emerge from this subordination of labour, this requires a coincidence between social need and the making of a profit. The ETS does not address this underlying control of the capitalist class but merely seeks to guide the direction of profit-making by pricing in the cost of greenhouse gas emissions.

This choice of an emissions trading system thus leaves the power over how economic production transitions away from using carbon to capital investors. This means that the owners and managers of capitalist firms will make the key choices on how decarbonisation will take place, structured by climate rent and market competitiveness. According to 2008 figures, just 25 companies accounted for more than 50 per cent of emissions under the ETS.[108] Using a more recent dataset based on emissions within the ETS, around 6.3 per cent of firms, less than 1,000 companies, account for nearly 75 per cent of emissions by stationary installations.[109] Thus, this relatively small number of firms within the capitalist class retains the social power over economic production.

We can object to this on democratic grounds. There is an acceptance that the climate transition towards decarbonisation is a lengthy and complicated process involving fundamental upheavals to economic production and, thus, people's livelihoods. Indeed, the EU recognises the need for

[103]R Felli, 'Environment, Not Planning: The Neoliberal Depoliticisation of Environmental Policy by Means of Emissions Trading' 24 (2015) Environmental Politics 641, 655.

[104]Ibid., 643.

[105]S Clarke, *Keynesianism, Monetarism and the Crisis of the State* (Edward Elgar Publishing Ltd 1988) 122.

[106]Ibid.

[107]Ibid., 110.

[108]A Vlachou, 'The European Union's Emissions Trading System' 38 (2014) Cambridge Journal of Economics 127, 133 citing World Bank, *State and Trends of the Carbon Market 2010* (World Bank 2010).

[109]EU Emissions Trading System data viewer based on 'size of entities' and level of emissions. See <https://www.eea.europa.eu/data-and-maps/dashboards/emissions-trading-viewer-1> accessed 2 December 2024.

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'deeply transformative policies'.[110] Despite this, the driving force of decarbonisation is to be private investment directed towards climate priorities by the state. This strategic use of markets and legal regulation does not foresee any direct role for citizens in influencing the future direction of economic production. *How* decarbonisation is to take place is a deeply political issue, perhaps the most profoundly political issue of our time. Many people are risking injury and jail because they believe the political response to be inept.[111] Thus, the question of how we use our limited remaining carbon emissions is a political question that ought to be subject to democratic control.

However, the ETS de-politicises this critical political question, meaning the only control the system offers to most citizens is to influence it through consumer action. Thus, instead of collective choices in the public good, influence is limited to private choices as purchasers of commodities.[112] Further, these choices in the commodities we purchase are not free but are rather structured by the availability of time and money. Those in society 'with less money . . . can exert relatively less power over important allocation decisions'.[113] Thus, the worst off in society have the least ability to impact *how* decarbonisation is to take place.

The ETS sits within the EU's broader climate policy, the primary goal of which is to use public power to drive private investment towards achieving climate objectives.[114] Elsewhere in its climate regime, the EU seeks to use public funds to support investment into developing green technologies.[115] For the Emissions Trading System, this aim is supported by making investment in carbon-intensive activity less profitable owing to the imposition of climate rent. Thus, the ETS could be said to represent part of the EU's general approach to solving climate goals. Instead of using public power to bring economic production under democratic and conscious control, the power of the capitalist class over production is extended.

This *indirect* approach to climate policy is part of a worldview which seeks to exclude public power from the question of *what* is produced, instead leaving production to the abstract power of the market. For Marx, this *indifference* to what is produced is endemic to the capitalist mode of production. The movement of the price mechanism acts as a 'blind power' beyond the control of the actors involved in economic production.[116] But faced with the need to radically reduce greenhouse gas emissions, we can seriously question the approach of reinforcing the blindness of our existing system through the creation of a system for pollution bargaining.

The alternative path is to work towards social relations that can allow for the democratic control of social reproduction within the planet's limits. Various visions of a post-capitalist world have been offered, including 'degrowth',[117] 'degrowth communism'[118], 'war communism'[119],

[110]European Green Deal (n 2).

[111]On the particular involvement of young people in climate activism, see S Neas, A Ward and B Bowman, 'Young People's Climate Activism: A Review of the Literature' 4 (2022) Frontiers in Political Science 1.

[112]See Chapter 3 'Citizens as Customers: Considerations on the New Politics of Consumption' in Streeck (n 98).

[113]R Felli, 'Beyond the Critique of Carbon Markets: The Real Utopia of a Democratic Climate Protection Agency' 98 (2019) Geoforum 236, 238.

[114]Gabor (n 96).

[115]See Ibid.; I Kampourakis, 'The Market as an Instrument of Planning in Sustainability Capitalism' 2 (2023) European Law Open 511 for analysis of the EU's shifting policy in this area. Initially, the European Sovereignty Fund was proposed as a way to support private investment towards the EU's climate objectives. In the 2023 EU budget, this was replaced by the Commissions 'Strategic Technologies for Europe Platform'. This is also supported by the Proposal for a regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials COM (2023) 160, which continues with the EU's strategy of 'adjusting risk and returns for ultimately volatile, profit-driven private initiative'. See I Kampourakis, Unpacking the Critical Raw Materials Act, VerfBlog, 2024/1/18 <https://verfassungsblog.de/unpacking-the-critical-raw-materials-act> accessed 2 December 2024.

[116]Marx (n 64) 959.

[117]J Hickel, *Less Is More: How Degrowth Will Save the World* (William Heinemann 2020).

[118]K Saito, *Marx in the Anthropocene: Towards the Idea of Degrowth Communism* (New edition, Cambridge University Press 2023).

[119]A Malm, *Corona, Climate, Chronic Emergency* (Verso 2020).

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'eco-socialism'[120] and 'eco-feminism'[121] with a variety of positions on the future productive forces of society and what our future relationship with nature ought to look like. It is to these alternative pathways that we must look, rather than leaving the key decisions of decarbonisation in the hands of the capitalist class.

Overall, the Emissions Trading System sits within a broader approach to EU climate law and policy that seeks to shape the actions of private capital in order to *indirectly* achieve climate objectives. This is rooted in the EU's prioritisation of continued freedom of accumulation for private capital. This approach seems insufficient for the scale of the climate crisis and the clear need for rapid decarbonisation. It closes off other paths to climate action, ones in which public power is used to directly and consciously shape the process of decarbonisation.

7. Conclusion

This paper has contributed to the literature on the EU Emissions Trading System and EU climate law by offering a fundamental challenge to the EU's current approach to decarbonisation. The existing literature in the area has offered relevant contributions to understanding the structure and operation of the ETS. This paper has taken a different approach, drawing on the tools of Marxist theory to question the power and class relations built into the EU's choice and legal implementation of the ETS.

The paper has argued that the ETS is best understood as imposing a climate rent on firms in order to disincentivise carbon-intensive production. The choice to approach climate law through this system prioritises the continued freedom of accumulation for capital in order to protect the competitiveness of EU firms on the global market. In so doing, the EU jeopardises the progress of decarbonisation on two grounds. First, the ETS tends towards a regressive wealth redistribution by raising the cost of basic goods and is thus likely to damage public support for climate policy. Second, the ETS is part of a de-politicised approach to climate policy that seeks to shape the actions of private capital in order to achieve climate objectives. This *indirect* approach seems insufficient to accomplish the rapid decarbonisation necessary to truly address the climate crisis. This paper opens up new questions for EU climate law literature by questioning the viability of the market-based approach to decarbonisation and pointing in the direction of alternative pathways that can use public power to consciously direct the decarbonisation of society.

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[120]S Fernandes, 'Ecosocialism from the Margins' 52 (2020) NACLA Report on the Americas 137.

[121]L Brownhill and TE Turner, 'Ecofeminist Ways, Ecosocialist Means: Life in the Post-Capitalist Future' 31 (2020) Capitalism Nature Socialism 1.

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