# The Financialisation of the Citizen

## Social and Financial Inclusion through European Private Law

Guido Comparato

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2018

Copyright © Guido Comparato, 2018

Guido Comparato has asserted his right under the Copyright, Designs and Patents Act 1988 to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©. This information is reused under the terms of the Open Government Licence v3.0 (http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3) except where otherwise stated.

All Eur-lex material used in the work is © European Union, http://eur-lex.europa.eu/, 1998–2018.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Comparato, Guido, author.

Title: The financialisation of the citizen : social and financial inclusion through European private law / Guido Comparato.

Other titles: Financialization of the citizen

Description: Oxford [UK] ; Portland, Oregon : Hart Publishing, 2018. | Includes bibliographical references and index.

Identifiers: LCCN 2018012879 (print) | LCCN 2018013369 (ebook) | ISBN 9781509919246 (Epub) | ISBN 9781509919222 (hardback : alk. paper)

Subjects: LCSH: Civil law—European Union countries. | European Union countries—Economic integration. | Social integration—European Union countries. | Capital market—Law and legislation—European Union countries. | Bank accounts—Law and legislation—European Union countries. | Credit—Law and legislation—European Union countries. | Confict of laws—European Union countries.

Classification: LCC KJE995 (ebook) | LCC KJE995 .C66 2018 (print) | DDC 340/.115094—dc23

LC record available at https://lccn.loc.gov/2018012879

ISBN: HB: 978-1-50991-922-2
ePDF: 978-1-50991-923-9
ePub: 978-1-50991-924-6

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

# Introduction

One must have money. This is one of the most traditional assumptions underlying private law in Europe, forcefully conveyed by the German expression '*Geld muss man haben*' ('One must have money'), which conveys the idea that a debtor should always be regarded as having the economic means to perform a monetary obligation. The corollary thereof is that even if a civil debtor does not actually have sufficient economic resources to fulfil the obligation, the debtor will not be relieved of his or her contractual duties: entering into economic transactions is a voluntary decision based on private autonomy and the consequences of such involvement in the market is the personal responsibility of the individual. 'One must have money' conveys, therefore, a moral instruction and implicit warning as to the hazard of private indebtedness.

One must have money. This has become over the course of the twentieth century a broad political and economic principle, articulated in recurrent expressions such as 'democratisation of finance'[1] in America or 'financial inclusion' in Europe. The significance of these expressions is that almost every member of society should be granted access to retail financial services. Through such access, individuals will be able to increase their own welfare as well as their chances to fully participate in a financialised society where fewer services are provided by the state. Not only the economy, but citizenry more generally becomes financialised. 'One must have money' conveys therefore an optimistic promise of growth which endorses private indebtedness.

This political-economic principle promotes indebtedness in order for citizens to fully participate in society and fulfil their economic role as consumers, increasing the demand for products and services supplied by traders—becoming at once better *customers* and better *citizens*.[2] However, the rationality of private law presupposes that those same indebted citizens have the monies necessary to perform their obligations and satisfy the legitimate claims of their creditors. The appeasement of the new political-economic rationale and the traditional values which inspire private law—regulating the basic interactions between debtors and creditors—has proven to be intricate in practice. The expansion of one places considerable pressure on the other. As a gradual shift from the public to the private dimension occurs, in the form of the privatisation of former public services and the increased relevance of governance by contract, private law is now charged with

[1] I Erturk, J Froud, S Johal, A Leaver and K Williams (2007).
[2] For the quite surprising origins of this distinction, see chapter one.

further public policy tasks. However, the fundamental principles and rules which permeate private law are often inspired by different considerations and are rooted in earlier and different socioeconomic contexts or even anthropological models of an individual, making private law possibly inapt to keep track with new developments. By requiring a growing number of citizens to become actively involved in the financial market, the political-economic principle of financial inclusion reaches citizens who may be less able to pay their debts back but who are nonetheless required to 'have money' by the above-mentioned contract law principle. The idea that 'one must have money' ends up destabilising the assumption that 'one must have money'. This mismatch can be the source of systemic failures and, consequently, calls for legal reforms meant to subordinate one of the rationalities to the other. The events linked to the 2007–2008 financial crisis and the subsequent debt crisis in Europe, which soon became a dramatic and still ongoing institutional crisis, have further complicated the relation between legal and economic rationales, revealing some of the risks which are inherent to the notion of financial inclusion, and lead us now to consider the role of private law within broader policies of financial inclusion.

Against this framework, this book focuses on the role of private law as an instrument to produce financial and social inclusion in a context characterised by a redefinition of the economic role of the state, by demonstrating the degree to which the financialisation of the citizen is taking place. First, it depicts the political and economic developments behind the popular idea of financial inclusion. In doing so, this book deconstructs that idea, showing the multiplicity of narratives surrounding it and its association with specific economic and political concepts, and unpacks the notion for analytical purposes into further subcategories. It then traces the development of that concept specifically in the European context, introducing the way in which European private law seeks to achieve the goal of financial and social inclusion. The book then moves on to consider the European rules which pursue this objective. The purpose is to analyse the idea of financial inclusion in its different nuances and its links to different aspects of private and, more precisely, European private law. The analysis of the role of private law in that context requires a wide-ranging look at positive law in Europe as well as the underlying policies inspired by various considerations of political economy, taking a dynamic approach meant to put the emphasis on the transformative forces to which the law is exposed rather than providing a detailed doctrinal analysis of fixed rules.

The theme of exclusion and, in particular, the considerable social consequences that derive from it in terms of over-indebtedness have been the object of a vast literature especially from a sociological standpoint, which offers valuable insights to academics and policy makers alike. Rather than repeating points already developed and established in that literature or offering new statistical data on the dimension of the phenomenon of financial exclusion, perhaps with a view to offering an empirical justification for proposed legal reforms, the focus of this book will be on the description of the role of private law as an instrument to produce financial inclusion or combat social exclusion, as two conflicting or possibly coinciding objectives subjected to different narratives.

## I. The Scenario

Financialisation, ie society's growing reliance on financial services, affects the social structure of the state as well as the private law which regulates civil society. Considered from the perspective of the state, financialisation primarily implies an increased significance of the financial sector for the state economy and the increased dependence of the state on international financial markets. Considered from the perspective of citizens, financialisation implies an augmented use of financial services[3] by consumers. This offers citizens new instruments to protect and invest their savings, but it also exposes them to new risks and requires them to become acquainted with intricate and highly specialised segments of the market. The notion of financialisation is as widespread in contemporary debate as it is multifaceted. The accounts of it tend to overemphasise its novelty, downplaying the historical continuity of certain financial phenomena. For our purposes, it should be highlighted that, historically, such involvement in the market by citizens through facilitated access to financial services has only become a deliberate policy objective since, at the earliest, the first half of the twentieth century in the US and only later in a European context.[4] The political and economic background of that development will be discussed in the following chapters. It suffices to note that in the 1980s economic and political developments leading towards greater individualism and (only apparently) reduced state regulation led the financialised model to become predominant. More fundamentally, the very way in which an individual becomes an element of a polity, ie a citizen, was affected: access to financial services becomes the gateway to full participation in society or, to put it in European jargon, social inclusion. Conversely, exclusion from the market entails adverse social consequences. In a context characterised by a retreating welfare state dependent on transnational financial market for financing, the polity becomes *de facto* a 'market state'[5] where the financial exclusion of citizens might easily lead to their social exclusion. Financialisation, thus, became a primary method of socialisation. These developments contributed to an evolution in the anthropological

[3] An indicative list of financial services can be found in the Annex on Financial Services to the General Agreements on Trade in Services. Article 5 initially stipulates that '(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance)' and continues with a comprehensive inventory of banking and financial services.

[4] J Logemann (2008).

[5] P Bobbit (2002) 229.

model of the individual which is assumed by private law. The rhetoric of the merits of extension of finance to an ever growing number of individuals—already described in the US context with the loaded term 'democratisation of finance'—hinted at a simplistic overlap of financial and social inclusion, while more recent events have warned against the social costs that a too hasty (over-)inclusion of citizens into the financial system might imply.

What is the salience of the idea of financial inclusion in law and politics, such as to justify its treatment in a monograph such as the present one? Is it a concept defined in a sufficiently concrete way and by authoritative sources so as to become an effectively leading principle for legal policy? And where can its origins be traced to? The inclusion of citizens in the economic and financial sector has been advocated by many different factions and economic actors until it has eventually made its way up the political agenda becoming the rationale for legal reforms. As the following chapters will show, financial inclusion is now commonly accepted as a policy goal at the national, European supranational and global level. As one telling example of the worldwide emergence of the policy, the World Bank now explicitly aims to bring millions of individuals without a bank account, the so-called 'unbanked', into the financial system, and promotes and measures the levels of financial inclusion in most countries around the world.[6] The underlying assumption is, of course, that a widespread diffusion of financial services will contribute to the overall wealth of those countries as well as to an improvement of the living conditions of their inhabitants. Moving from the global to the regional level, the realisation of a higher degree of financial inclusion appears to have become an autonomous goal of the European Union as well.[7] The European Union, initially with a Recommendation[8] and more recently with a Directive,[9] has promoted financial inclusion through providing access to a basic bank account to all European consumers. Comparable, though certainly different, initiatives meant to facilitate access to financial services can be found in related areas of access to credit. More generally, economists aiming for the development of communities worldwide have even pleaded for the recognition of credit as a basic human right,[10] particularly as an instrument to help disadvantaged individuals to get out of poverty.[11]

[6] See, for example, recently: the World Bank, in April 2015 concluded: 'Helping 2 billion people reach financial services is an ambitious undertaking—but the Global Findex data help point a path forward. We know who the unbanked are, how they get by, and why they do not have an account. Aided by the insights captured in the data, governments and the private sector can take effective steps to help bring the unbanked into the financial system.' A Demirguc-Kunt, L Klapper, D Singer and P Van Oudheusden (2015) 4.

[7] COM(2008) 412 final, 4.5.

[8] Recommendation 2011/442/EU.

[9] Directive 2014/92/EU.

[10] For a discussion as to the theoretical foundations of a human right to credit, see M Hudon (2009).

[11] M Yunus and A Jolis (2001) 280.

At a certain point, financial inclusion was an aim of legislators, financial services providers and consumer rights advocates alike: almost all agreed that access to a basic bank account, to credit, or to investment services should be granted to a greater number of citizens, though each with a slightly different understanding of it in mind. Who can possibly disagree with such a positive term like 'inclusion', which suggests benign ideas of participation and integration? The problem, rather, seemed to be that finance was still too exclusive and distant from the lives of ordinary citizens—in short, not 'democratic' enough. Concept such as democratisation and inclusion offered a 'win-win' for all the parties involved: retail financial services providers reaching out to more customers and customers having monies readily available to increase their own welfare. This generally came at the price of a certain trivialisation of the risks generally associated with the notion, and a shift to the notion of *access* to the financial market rather than *protection* from financial risks and their detrimental social repercussions. That harmony of intents lent the notion of financial inclusion a degree of acceptance that made it appear to be a neutral political objective: it is normal and unquestionable that people should have easy access to financial services and a debate on the contents and desirability of the notion is redundant. In this climate, the only aspect deserving discussion is the means through which it is to be achieved. But the positive message of inclusion conceals its political background and normative effects. As the term gained momentum in policy discourse and was unfolded in all possible variations, the notion of inclusion has started being considered more carefully in some research fields, and the question has emerged as to 'whose interests are served by the way that inclusion is (re)presented and talked about?'[12] The same enquiry should also be engaged in by lawyers.

Indeed, the development which led to general recognition of the need to financially include citizens is in fact curious, in particular if considered from a European perspective. First, the EU is composed of a plurality of countries with different economic and welfare systems, in which the degree of financial and social inclusion is quite diverse. In advanced capitalist countries, levels of financial exclusion tends to be lower, while newer EU Member States statistics show extremely high numbers of, for example, unbanked individuals. In this context, the development

[12] The introduction to a piece by L Dunne (2009) 42, although it addresses inclusion in the particular realm of schooling and education policies, is worth quoting here: 'In my professional lifetime, the notion of inclusion has evolved and gained momentum. In official scripts, it is presented as a fundamental good and worthwhile endeavour. It may be seen as a concept that implies that nobody is excluded. Over time, I developed an increasing unease with "inclusion" myself, and with the discourses surrounding it within my professional practice. My consequent research enquiry was framed by a recognition that the ways that children are spoken about, positioned and "managed" in schools in the name of inclusion, however seemingly altruistic and well meaning, are not benign and can have disciplinary effects. A question that drove my enquiry was: whose interests are served by the way that inclusion is (re)presented and talked about in education?' Dunne goes on to employ Foucault's (1978) notion of knowledge-power to explore the discursive truth-effects of the discourse on inclusion.

of a pan-European notion of financial inclusion might prove to be challenging to say the least. Secondly, and more fundamentally, if inclusion serves the interests of both services providers and consumers—appearing as a win-win situation—a spontaneous achievement of that objective by market forces themselves would be expected. On the contrary, and surprisingly, financial inclusion does not appear to be a condition that the market itself is able to attain without the support of specific legal instruments. For example, all attempts made to extend the use of financial services by way of soft law instruments failed, leading the European Union to elaborate more stringent reforms intended to achieve the objective. This consideration rather hints at the existence of contested interests and values behind the apparently neutral notion of financial inclusion.

The vision of financial inclusion as a neutral and commonly agreed objective is in fact a misleading depiction, as the notion rather bears different or even clearly politically coloured connotations. More often than not, the various advocates of financial inclusion have diverse understandings of what that concept should mean *in concreto* and, consequently, opposing ideas as to the means to achieve that purpose and to the role of the law. To outline just a few possible issues: should the law acknowledge a generalised right of access to financial services for all citizens? Should it allow for discrimination among citizens and, if so, according to which criteria? Should it limit itself to providing access or also protection? Should it regulate the conditions under which a service is provided and how? Should it go as far as to dictate the price of basic services for which it promotes access? Should it offer debt relief to over-indebted customers? And to all of them, or only the 'good faith' ones? One single and undisputed answer to each of these questions does not exist. These and many more possible questions indicate that the concept itself remains ambiguous and necessitates a more careful consideration, all the more if it is seen as a guiding principle for private law, in addition to the recent regulatory and legislative interventions in the European Union. A more thoughtful analysis of the concept is required, not for the sake of pure critical *de*construction, but rather for *re*construction, as it is essential that a workable concept emerges clear in its normative content so that it may be integrated into private law. This is all the more useful at a time when different political and ideological forces focus on the relation between law and finance, as a new social awareness of the bearing of the financial market on ordinary citizens' lives is emerging. The protest movements which developed and spread around the US, Europe—in particular in the most strongly affected countries of Iceland, Greek and Spain—and beyond, which often bear a transnational dimension of protest,[13] are just the most visible manifestation of that increased awareness as to the social impact of financialisation.

In this context, the debate on financial and social inclusion/exclusion was revived, leading European policy makers and scholars to inquire as to the degree to which exclusion from the financial market might have social consequences

[13] See D Della Porta and A Mattoni (2014).

for citizens.[14] On the one hand, the notions of financial inclusion and democratisation of finance have been subjected to a more scrupulous examination,[15] as reforms aiming at strengthening the 'protection'[16] of financial services users have been carried out. On the other hand, the notion of social inclusion, which had developed on the continent in the 1970s as part of a policy meant to extend state protective action to a range of disadvantaged subjects which was wider than just the 'poor',[17] has become more pressing, and references to it rose steeply in numerous policy documents produced by the European Union. As the effects of the financial crisis started to dramatically impact citizens at risk of exclusion, the fight against poverty and exclusion became a more well-defined objective of EU social policy.[18]

In fact, the relation of the notion of social inclusion to the one of financial inclusion now also appears in need of a reconceptualisation.[19] Most succinctly, if social inclusion was initially considered to be a positive side effect flowing from financial inclusion (coincidence of financialisation and socialisation), the post-crisis explosion of social exclusion as a consequence of a previous imperfect financial inclusion leads us to consider social inclusion as a different objective which might occasionally clash with financial inclusion (dissociation of financialisation and socialisation). If financial inclusion and social inclusion are distinct and possibly diverging aims, the relevant question is how they can be drawn together in order to ensure that the initial promise of democratisation of finance is maintained. If financial inclusion includes both access and protection, social inclusion has to be considered not as a natural side effect of access but rather as a guiding principle for protection (reconciliation of financialisation and socialisation).

Appropriate strategies will need to be devised to include social considerations into financial regulation, so that the role of law becomes essential to the purpose. The legal infrastructure of the supervision of financial markets has been profoundly modified in Europe, especially in the last few years, with a new institutional framework, and some new principles and rationales—in particular the one of financial stability—have emerged as of paramount importance.[20] The reforms at both the European and national level have not been limited to the public administrative infrastructure, on which a big part of EU legal scholarship has focused, but have noticeably engaged the substance of contract law as well, depicting a completely new legal scenario for financial products and services. These instances of the transformation that private law is undergoing in the shadow of the ongoing

[14] See H-W Micklitz and I Domurath (2015).

[15] *The Wall Street Journal*, 'The 'Democratization of Credit' is Over—Now It's Payback Time' October 10 2009.

[16] M Melecky and S Rutledge (2011) 19.

[17] R Lenoir (1974).

[18] See Communication from the Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final.

[19] See H-W Micklitz (2013).

[20] Among others, see E Wymeersch, KJ Hopt and G Ferrarini (2012); N Moloney (2010).

European crisis can be linked in turn to more fundamental changes in the structure of the European model of the state and of its economic role in a globalised economy.[21] European private law as it stands contributes to achieving the objective of financial inclusion, determining a financialisation of private law against a wider framework of financialisation of the economy and the state, but at the same time strives to develop effective instruments to protect the interests of the citizens who might bear the negative consequences of misguided financialisation. A look at European private law shows the existence of a so far unsolved and not insufficiently examined tension between regulations inspired by the *political* principle that 'one must have money' and the traditional approach inspired by the *moral* idea that 'one must have money'.

## II. Inclusion, Finance and Private Law

The relevant role attributed to regulation might give rise to a preliminary question concerning what the objective of regulation itself should be: is it promoting inclusion or combating exclusion? This seemingly trivial question in turn requires shedding some more light on the inclusion/exclusion dichotomy, inquiring how each term of the dichotomy refers to the other. A few introductory and quite broad considerations are useful in this place. In general, inclusion and exclusion can be regarded as two sides of the same coin. As the sociologist who most accurately investigated the dichotomy in theoretical terms remarked, '*"Inklusion" bezeichnet dann die innere Seite der Form, deren äußere Seite "Exklusion" ist*'[22] ('Inclusion' describes the inner side of the form, whose outer side is 'exclusion'), whereby exclusion is identified purely as the external side of inclusion. While discussing the two terms we are thus observing the very same object, though considering it from two different perspectives. Given this necessary interrelation—or rather even identity—a policy programme or a regulation meant to combat exclusion could perhaps appear to be fully equivalent to one meant to promote inclusion and vice-versa, so that the question of whether it is promoting inclusion or combating exclusion appears redundant. This is, however, not necessarily the case. Paradoxically, if the two elements are sides of the same coin, any policy meant to promote inclusion will have to accept a certain degree of exclusion as well. In notional terms, the persistence of such a degree of exclusion is logically necessary for the subsistence and well-functioning of the system in which one is supposed to be included. If this is true, over-inclusion might be detrimental to the very existence of the structure whose borders are defined by the interaction between

[21] On the causes and effects of this transformation for private law, see H-W Micklitz and Y Svetiev (2014); G Comparato (2016) 'Factors Behind the Transformations of Private Law'.

[22] N Luhmann (2005).

inclusion and exclusion. In more practical terms, can financial inclusion reach the point of including all citizens into the financial system under the same conditions? Initially, this requires a further problematisation of the notion of financial inclusion, regarding both the adjective 'financial' and, most importantly, the ambiguous word 'inclusion'. This will be discussed further below. It suffices to note here that, with regard to the adjective 'financial', a multiplicity of financial instruments of a very different nature can contribute to dissimilar extents to inclusion: bonds, shares, consumer and mortgage loans, current accounts, savings accounts, pension funds and so on can all be considered to fall within the scope of financial inclusion policy. The importance, impact and risks of each of them are diverse, so that the general principle of financial inclusion must at some point boil down to more specific forms of regulation addressing particular segments of the financial market, setting the conditions of both access and protection. It must be clarified that space does not allow adequate consideration of each of those instruments in this book, and the focus will lie on some of them only.

Secondly, with regard to the term 'inclusion', this should not be understood in purely linguistic terms as a process which brings new components into a pre-existing structure, without considering the constitutive role of the inclusive process for the existence of the structure itself. To put it in less abstruse terms, all the legal provisions which promote inclusion in the market contribute to the creation of that market. Thus, inclusion policies cannot simply be regarded as instruments meant to extend the benefits of the financial market to a higher number of citizens, as much rhetoric on the democratisation of finance represents it, but they should rather be considered as instruments that shape the financial market. These considerations should warn of the deceptiveness of a narrative of pure extension of the advantages as well as the disadvantages of the financial market to consumers, according to which the law can only have the function of extending or limiting inclusion without regulating the essence of the market. This emphasises the significance of private law as an instrument to achieve the policy of inclusion.

It is at the outset necessary to warn that the strict dependence of private law rules from the public policies pursued by the state can be criticised according to traditional views which conceive law in general as detached from politics, and private law more particularly as the law of individuals detached from public law. Under that viewpoint, the particular economic policies pursued by the state would be irrelevant for private law, which rather operates according to its own logic. Generally relying on an understanding of party autonomy as a form of 'negative freedom',[23] those views would perceive private and public law as two opposite domains and accept intrusions of public considerations in the private law rationality with discomfort and only as exceptions to the general rule of the freedom of contract of parties. This reconstruction can however be challenged on theoretical

[23] I Berlin (1969).

and on empirical grounds alike. It suffices to notice here that, historically, private law has transformed according to fundamental changes in the structure and the political economy of the state, such as those clearly described by the legal historian Franz Wieacker, analysing the characteristics of private law in a rising industrial economy.[24]

Because of the focus placed on private law, a few words on the actual situation of European private law are compelling in this introduction. It must initially be observed that in the European context, the analysis of private law is made challenging by the impossibility of speaking of private law in a single way. Not only is Europe characterised by a well-known multiplicity of legal systems and traditions, but the reciprocal interaction between that plural domestic private law and EU law must also be considered.[25] This interaction cannot be simplistically explained as an overlap of two largely coinciding legal regimes. National private law aims at regulating the whole civil society, as a form of civic constitution; in contrast, EU private law has the much more limited function of fostering some of the general policy aims of the European Union, while the capacity of the EU institutions to act is limited by the principles of conferral, subsidiarity and proportionality, which would make illegitimate any private law measure which does not expressly and proportionally aim to achieve the Union policies.[26] EU private law is, in this sense, constitutionally bound to be instrumental. At the same time, this constraint blurs the already vague boundaries between law and regulation.[27] After having identified the emergence of a new goal among the policies of the EU more or less clearly covered by apposite treaty provisions, it is then possible to see how the private law created by the EU (or, *rectius*, the law of the EU which has a relevance for private law) is employed as an instrument to achieve those objectives. This approach, which can be described as a functionalisation or instrumentalisation of private law, opens the way to a series of possible modifications of the rules which traditionally govern the relationships between the citizens, which are all the more inspired by diverse public policy considerations or take their roots in a different anthropological model. Among some of those goals which are most relevant in the perspective of the private lawyers and which have already inspired much of the EU interventions in contract law, the creation of the internal market in general terms and the achievement of a high degree of consumer protection more specifically can be highlighted. Those aims have been fundamental in the development of a more or less coherent corpus of European legislation meant to protect the

[24] Most telling, F Wieacker (1974).

[25] On the different aspects of pluralism in this regard, see the contributions in L Niglia (2013).

[26] See Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising I)* EU:C:2000:544. This holds true even if the Court of Justice of the European Union (CJEU) has traditionally been generous in appreciating the width of the powers of the European Union.

[27] Further on European private law and regulation, see G Comparato, Y Svetiev and H-W Micklitz (2016).

consumer, identified as the weaker party in an economic transaction with a trader, and that have a considerable role to play also within the general theme of financial inclusion, despite the tendency to except financial contracts from the scope of application of a few 'general' consumer law directives and regulate them through more specific ad-hoc mechanisms.[28]

Given these premises, what is the position of the goal of combating financial and social exclusion within the EU legal order? Has it emerged as a legal principle either in primary or, at least, in secondary legislation? All the aims discussed above, rather than being dissimilar and unrelated ideals which confer inhomogeneous competences to the EU institutions, appear to be interrelated goals leading to parallel and analogous results. The coexistence of these objectives, which limit and steer the action of EU institutions, should be taken into account when considering the way in which the goal of financial inclusion is pursued in the EU legal order; for instance, if financial inclusion is addressed by the EU legislator through the internal-market competence, ie as an instrument to allow more citizens to participate in the internal market, then it should also be considered that 'consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'.[29] Taking into account the need to establish an internal market characterised by a high degree of consumer protection, the term financial inclusion, therefore, needs to be construed as the requirement to include a greater number of citizens in the financial internal market (access dimension), while providing them with a certain degree of protection from financial as well as social risks (protective dimension). It will be shown, however, that the law has mostly utilised the rhetorically loaded 'inclusion' as a synonym of access, downplaying its other dimensions.

[28] See for instance, recital 32 of the Consumer Rights Directive (Directive 2011/83/EU of 25 October 2011 on consumer rights): 'The existing Union legislation, inter alia, relating to consumer financial services, package travel and timeshare contains numerous rules on consumer protection. For this reason, this Directive should not apply to contracts in those areas. With regard to financial services, Member States should be encouraged to draw inspiration from existing Union legislation in that area when legislating in areas not regulated at Union level, in such a way that a level playing field for all consumers and all contracts relating to financial services is ensured'. Relevant provisions are instead set by Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services. It can also be noted that the much older Unfair Contract Terms Directive (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts) does not exclude financial contracts from its scope of application and has proven to be of great value in cases concerning those contracts. It is also noteworthy that the Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market), generally characterised by a maximum harmonisation approach, acknowledges at Art 3(9) that '[i]n relation to "financial services", as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates'.

[29] Art 12 of the Treaty on the Functioning of the European Union.

## III. Methodology

This is largely a multidisciplinary study on the politics of private law. Yet, the traditional private lawyer with expectations of a positivist or case-law based analysis of the law might be the most vexed reader of this book. The intent is rather to link the general discourse on financialisation of society with more concrete evidence drawn from the law. Methodologically, the views presented in this book are based on an analysis of EU legislation, case-law and, even more importantly, the policy papers produced by the EU institutions. These are the documents in which the objectives of the Union are most clearly spelled out and that, at the same time, anticipate and guide the adoption—and often even the interpretation by the lawyer—of more specific rules of contract law. Combining those sets of information it becomes clear how the political-economic foundations of the idea of financial inclusion are implemented in concrete legal rules, which *de facto* translate abstract policy considerations into social interrelations among citizens. Although the focus of this book is on general trends in Europe, giving particular attention is given to the law of the European Union, references to national laws are constantly made throughout the book. Those references are important to highlight the social and economic context as well as national legislative frameworks in which financial inclusion is discussed, especially in their interrelation with supranational law. European private law is understood, therefore, in broad terms, including the interaction between supranational institutions and national laws. The UK is also obviously embraced by the notion of European private law.

The book undertakes, thus, to trace a continuum between political economy, policy and law, aiming to link the macro legal-economic to the micro dimensions, which are more visible in private law. The perspective adopted herein starts from broad political and economic ideals which stand behind financial inclusion; later, it identifies traces of that understanding in the policy documents on the regulation of EU financial markets and, finally, looks for the concrete application of policies in European private law. This analysis unfolds over four chapters, each devoted to the regulation of one particular aspect of financial inclusion. Needless to say, this will imply narrowing the scope of the analysis to certain areas only, leaving some other fields outside the scope of analysis; for instance, it will not focus on investment services nor address insurance contracts, which the European Union has also shown a renewed interest in regulating.[30] Through this operation it will become clear how a new policy rationale, ie the promotion of financial inclusion/fight against financial exclusion, has emerged and is affecting private law, leading to a functionalisation of private law[31] in light of particular market rationalities.

[30] COM(2010) 2020 final.

[31] With specific reference to the impact of EU law on national contract law, see extensively CU Schmid (2010).

These developments have further contributed to the disintegration of the misleading classical image of technical neutrality in private law, turning it into a functional device to achieve macroeconomic objectives. This is particularly evidenced by the growing tendency to regulate private relations, moving from a model which is more respectful of the autonomy of the parties involved, left free or purely encouraged to realise inclusion, to one in which that objective is more strongly sought through regulations with a strong market-building function. This pattern, which departs from almost complete freedom of contract and the absence of specific regulation, then increasingly relies on self-regulation and eventually public regulation to achieve financial inclusion, becomes clear in all the cases discussed. In this respect, and by way of a methodological explanation, a clarification regarding the term 'private law' seems opportune. Generally understood as the law governing the relations between private citizens, the exact definition and the borders of the notion of private law tend to vary in different legal traditions, which can include or exclude particular aspects, which remain relevant for this book. Private law is herein understood in broad terms, including most notably commercial and consumer contract law but also aspects of civil procedure, insolvency and even administrative law which have a crucial impact on private relations. This perspective downplays the importance of the public/private (law) distinction, without aiming to discuss it further in detail or to reaffirm its substance.

Rather than offering a normative analysis, the book remains for the most part descriptive or, more correctly, critically descriptive. In other terms, it does not aim to explain the law as an analysis of legal texts interpreting it in a systemic way in order to build a coherent structure of legal concepts, but rather describes positive law in its broader political-economic context without, however, formulating overall recommendations for legal reform, which are rather left to the reader. Yet, in the presentation of various arguments, critiques are occasionally made of particular ideas and doctrines. To this end, the study avails itself of the contribution of other academic disciplines besides legal studies, drawing on economics, political science and sociology literature.

## IV. Structure

In order to address coherently the numerous questions which have been raised, this book is organised as follows. Initially, the focus will be placed on the concept of financial inclusion in a broad sense. Rather than offering statistical data as to the figures on financial exclusion and inclusion—there is a considerable and sometimes puzzling number of publications and studies in existence—the evolution of that notion will be critically outlined. The notion of financial inclusion can be linked to economic processes of financialisation of society, as well as deeper transformation in the state and the political economy that the state pursues, which will also have to be addressed.

Chapter one is devoted to critically outlining the evolution of the idea of financial and social inclusion within the framework of the economic processes of financialisation of society and the deeper transformation of the political economy of the modern state and debtor-creditor relations. It shows how financialisation requires the inclusion of a greater number of individuals in the financial market, on the basis of the argument that this will increase consumer welfare. This argument is considered to lie at the basis of the purported association of financial and social inclusion, which chapter two will undertake to dissociate.

Slowly narrowing the focus to the European context, chapter two traces the idea of financial inclusion in the policy documents of the European Union. It suggests that despite its origins in the US context, the discourse on financialisation assumes particular connotations in Europe. The chapter traces the evolution of that notion and highlights how 'financial inclusion' in Europe interacts with peculiar notions of 'market inclusion' and 'social inclusion', discussing how each of these concepts relates to conceptions of justice more familiar to private lawyers. It further shows that the policy documents of the European Union have identified a series of key topics which are particularly relevant for promoting inclusion. It will be shown that, even if an interest for social exclusion as a part of financial inclusion has risen only more recently on the European agenda, regulatory measures have traditionally been inadequate to consider that aspect, which has been mostly left to the Member States. On the contrary, EU private law in the areas considered seems to be characterised by an understanding of financial inclusion as mostly market inclusion, as consistent with the policy aim of creating an internal financial market.

As stated, the angle which is employed to analyse the notion of financial inclusion is specifically a private law one and this book will look at the way in which this notion affects private law. A set of core issues which appear to be particularly relevant in the perspective of achieving financial inclusion, mostly relying on sociological and economic literature as well as, notably, policy documents of supranational institutions will be identified. The classification follows one proposed by the European Union in dealing with the topic of financial inclusion, which is not made on the basis of a legalistic criterion meant to distinguish single particular private law doctrines or contract types, but rather on social and economic aspects which are at the same time dealt with by different private law tools. In that light, four key and highly interlinked areas can be highlighted: access to a bank account, access to credit, over-indebtedness and financial education. For each of these areas, it will be shown how private law rules—both of traditional and regulatory nature—contributes to produce, or even impede, financial inclusion either in a market-oriented sense or a social sense, while the regulation of those issues at the European level is taken into consideration highlighting the function that this is supposed to perform.

Chapter three initially focuses on access to a bank account, which is commonly regarded as the most basic financial service that an individual should have in order to be considered financially included, as well as clarifying in the banking law of several jurisdictions the minimum and necessary economic transaction in order for a bank/customer relationship to be established. The chapter recounts the evolution of EU law in this area, showing that a growing interest and regulatory involvement culminated in the 2014 Directive on access to payment accounts with basic features.

Chapter four looks into the instruments and the legal controversies surrounding access to credit. While offering credit to individuals has emerged historically as the first measure of 'democratisation of finance' in the US and 'credit for everyone' was considered, at least until the 2007–2008 financial crisis, as a policy objective to be fully endorsed, more recently a less enthusiastic approach has emerged. Policy makers and scholars alike have come to recognise the possible negative repercussions of the idea of easy credit and have started advocating more explicitly the need for a more responsible use of credit. EU private law shows clear traces of this evolution, which are all analysed in this chapter.

The most worrisome negative aspect of policies of financial inclusion is that, when they are provided with too many financial services, citizens might become unable to fulfil their contractual obligations, entering a situation which is defined as over-indebtedness. While this situation is traditionally ignored by private law (at least general contract law, although it is considered by commercial law), the insolvency of a high number of citizens in a strongly financialised economic system might lead both to economic systemic risk and to social problems. In recent years, especially after the 2007–2008 financial crisis, a growing number of European states have introduced quite disparate mechanisms to remedy the over-indebtedness of civil debtors in an attempt to counteract social exclusion and, at the same time, ensure financial stability. The rationales behind those reforms are directly addressed in chapter five.

In a context in which the general policy goal is to promote the extension of financial services, while preventing the systemic and social risks which could derive from over-inclusion of consumers in the financial market, a strategy which is increasingly often advocated to allow for a more responsible use of financial services consists in the promotion of the financial literacy of the citizen, ie financial education. According to this view, many of the problems deriving from the use of financial services among individuals stem from the illiteracy of the citizen who, notwithstanding being provided with a conspicuous set of pre-contractual and contractual information, lacks the intellectual capacity to understand that information and, as such, should be aided through financial education programmes. Chapter six therefore addresses this topic, showing how controversial and possibly harmful to the interests of consumers this view, which represents the most evident step towards a model of the financialised citizen, could be.

This kind of division of topics will admittedly produce certain overlaps between some sections of this book. For instance, the discussion of the principle of responsible lending, an instrument of consumer credit law meant among other things to prevent over-indebtedness which strongly impacts on the possibility of having access to credit, will necessarily cover aspects dealt with in both the chapters on over-indebtedness and access to credit. Over-indebtedness will be a recurring term also in the discussion of other related areas. Such an overlap is useful, rather than detrimental, to the coherence of the discussion, since it contributes to showing how the different dimensions are closely interlinked and how private law rules impact on each of them. At the same time, the purpose is not to offer a systematic or dogmatic interpretation of the rules of private law—which is an operation which would require an in-depth analysis of the positive law of one or more jurisdictions when the literature on even relatively new concepts such as responsible lending is already enormous—but rather to expose their function as instruments to allow for the inclusion in, or the exclusion from, the financialised economy. Rather than analysing particular pieces of legislation or case-law, therefore, this book's interest lies in the evolution of the policy considerations behind those sets of rules.