

Chapter 21

The European Union's Approach towards Ageism



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21.1 Introduction

The European Union (EU) provides legal guidance and policy coordination for its member states and represents an additional layer in the political, economic, and social reality faced by older people. What started as a purely economic union has been transformed into an enhanced inter-state collaboration on an increasing number of policy areas. The EU is now expected to act not only in several fields that impact older people's lives, including non-discrimination and human rights, gender equality, patient safety, consumer protection, and passengers' rights, but also to engage in "soft cooperation" on aspects of social security, notably in the fields of pensions and healthcare. Studying ageism at the EU level can, therefore, help to unravel whether the multilateral legal, policy, and economic processes serve to disable or foster the various barriers and discrimination in old age.

This chapter does not discuss the case law of the Court of Justice of the European Union (CJEU), which is presented in another Chap. 19 Doron et al., 2018 of this volume, but instead makes a critique of the scope of the EU's agenda to tackle ageism. Focusing on the end of the life spectrum and based largely on experiential knowledge of the EU arena, I do not look into ageism as a theoretical construct but instead am interested in its policy application by the Union's bodies.

Under these considerations I critique the EU's narrow agenda, which fails to adequately address equality in old age. I also argue that the Union's conceptualization

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of ageing and older people is susceptible to prejudice. To do this, the chapter first presents the sense of equality that guides the assessment of the EU's performance in tackling ageism (Part 21.2). Second, it discusses the EU's main achievements in the area of non-discrimination and ageing, as well as its shortcomings (Part 21.3). Third, it exposes examples of ageist discourse that create discrepancies between EU rhetoric and practice to promote equality for all ages (Part 21.4). And finally, it suggests how EU laws and policies can move towards a more substantive form of equality through a human rights-based approach (Part 21.5).

21.2 Towards a Substantive Understanding of Equality in Old Age

Ageism is not the same as discrimination as the latter involves a manifestation of ageist prejudice in the form of behaviour or treatment (Herring 2009, p. 12). According to its treaties, the EU has a duty to combat discrimination (Article 3§3, Treaty on the European Union 2012), but there is no language explicitly stipulating the need to fight ageism in all its forms or to address comprehensively the social construct of old age that is entrenched in European society. For this reason, in this chapter I understand the EU's efforts in the area of non-discrimination as contributing generally to an anti-ageist agenda. However, the lack of the use of the term and concept of ageism in EU discourse probably reveals a narrow understanding of structural inequalities in old age.

Equality and non-discrimination are not uncontroversial terms; they are attributed diverse meanings and goals (Fredman 2011, p. 40). Not all forms of unequal treatment qualify as wrongful discrimination, even more on the grounds of age where—according to international and European law—even direct discrimination, such as age limits, can be justified in the context of labour market policies, pension systems, and the allocation of scarce resources.

This chapter goes beyond a formal understanding of equality according to which likes should be treated alike. It adopts Fredman's (2003) definition of equality as "the facilitation of choice or autonomy, the protection of dignity and the enhancement of participative democracy or social inclusion" (p. 38). Accepting that structural barriers, such as ageist norms, may create disadvantages for older people, it asserts that positive action might be necessary to achieve equality of opportunities and prevent undignified treatment and marginalization of this population.

This broad understanding of equality is not merely theoretical but builds on the aspirations of the EU treaties and the Charter of Fundamental Rights (known as the Charter or the EU Charter). Thanks to Article 19 (previously Article 13) of the Treaty on the Functioning of the European Union (TFEU), the EU can take positive action, such as adopting dedicated legislative measures, to preclude discrimination. Moreover, Article 21 of the Charter of Fundamental Rights (European Union 2016), which became part of the EU's primary law after the Treaty of Lisbon in 2009

(European Union 2007), prohibits discrimination on the grounds of age. This provision represents a novelty in human rights law, which lacks an explicit and clear protection from age discrimination. Nevertheless, the EU's primary law merely gives the possibility for the EU to take anti-discrimination measures, without imposing a duty to do so. In addition, positive action is possible only upon the unanimous agreement of all the member states of the European Council (Article 19§1 TFEU), in compliance with the EU's *existing* array of competences and the principle of subsidiarity,¹ as well as only within the remits of EU law (Article 51 of the EU Charter of Fundamental Rights). These limitations give broad discretion to EU bodies and member states to decide whether and what type of positive action might be needed to tackle discrimination.

In the legal tradition older people are consistently problematized as subjects of social security and economic and social rights (Dabove 2015, p. 141). Legislative instruments preceding the EU Charter of Fundamental Rights, including the EU's 1989 Community Charter of Fundamental Social Rights of Workers (European Community 1989), which enshrined the right to adequate income in retirement, and the Revised European Social Charter of the Council of Europe (1996), which introduced the first legally binding reference to the "right of the elderly to social protection" under Article 23, only attributed social rights in old age, discounting aspects of equal treatment. Failing to enshrine a vision of equality in old age can send a discriminatory message and further reinforce stereotypes of older people as recipients of welfare and individuals with needs instead of rights.

The EU Charter of Fundamental Rights includes "the most reliable and definitive confirmation of the rights of the elderly ... within the EU" (Meenan 2007, p. 65). It recognizes in Article 25 "the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life." Unlike previous instruments, this provision is introduced in the Equality Chapter of the Charter and represents another remarkable legal innovation (EU Network of Independent Experts on Fundamental Rights 2006). Article 25 should be read as giving guidance on how equality in old age needs to be interpreted so that it becomes effective. What this Article tells us is that—as with other discrimination grounds—the EU aspires to an application of substantive equality that needs to be understood as an obligation not only to refrain from action that treats people less well because of their age but also to take into account the particular needs of older people through positive action (Duncan 2008; McLachlin 2013; Nikolaidis 2015). As a matter of fact, the EU legislature provides us with a clear benchmark on the basis of which we can measure the Union's performance in the pursuit of equality in old age. *Dignity, independence, and participation* are the bedrock of a human rights-based approach to equality in old age. These notions mirror Fredman's (2003) definition of substantive equality, which refers to dignity, choice, autonomy, participative democracy, and social inclusion (p. 38).

¹According to the principle of subsidiarity, in areas where the EU does not have exclusive competence (including non-discrimination), action is in principle at the discretion of member states, and the EU can only take action if the objectives cannot be sufficiently achieved at the national level.

Placing *dignity* at the centre of equality means that the EU should not diminish older people or perpetuate ageist treatment. Lumping people together in age categories can be a risk to their inherent dignity as it attributes certain characteristics (such as loss of ability, contribution, or value) to the individual and accepts stereotypical views of old age. In practice, a conception of equality that respects the dignity of the person should not result in undermining the moral and social status of older people. At the same time, equal respect for the dignity of people of different ages will on occasion require treating age groups differently (Duncan 2008). In addition, the distinct experiences of age discrimination faced by older persons justify tailored measures that take into account the specific challenges of old age (Mégret 2011; Seanad Public Consultation Committee 2012). For example, more needs to be done to cater for groups particularly at risk of discrimination, such as older women, who, in addition to suffering from gender and age discrimination in the labour market, are now struggling with increased difficulties to reconcile work and family care duties as a result of the reduction in social services to older persons.

When *independence* underpins equality agendas, policies are directed towards giving people of all ages choices to live independently. To reach this objective, not only are older people to be offered the same array of opportunities as everyone else, but they are also to be enabled to fulfil their choices (Fredman 2003, p. 44). This understanding implies going beyond an obligation to abstain from limiting older people's autonomy to taking steps, such as promoting adapted housing, adequate income, access to flexible working, care, and support so that older people can continue to live independently.

The notion of *participation* is broad, encompassing social and cultural life (which are included in the letter of Article 25) but also—according to the explanations to the Charter (Fundamental Rights Agency n.d.)—all other spheres of life. Age discrimination and age stereotyping underpin social exclusion, whether in relation to employment, health care, or the fair distribution of assets and resources (Stuckelberger et al. 2012). Including participation in the conceptualization of equality is not merely about avoiding interference but also about facilitating meaningful involvement, strengthening consultation, and combating social exclusion, for example through non-discrimination legislation, accessibility standards, and affirmative action for the integration of those in vulnerable situations, such as migrants and people with functional limitations. A substantive equality approach is not exclusionary, in that it aims to ensure equal participation in society and build the capacity of individuals to understand and claim their intrinsic rights.

In sum, the EU Charter aspires to more than consistent treatment to achieve equality across all ages. Yet the absence of a legal duty for the EU to adopt non-discrimination legislation and promote equality, which applies to all grounds of discrimination based on Article 19§1 TFEU, is one of the reasons why, to date, “the scope of legal protection on grounds of age hardly goes beyond the employment sector” (Lassen et al. 2014, p. 106). Whilst acknowledging this normative restriction, this chapter investigates the potential for the EU to become a driver for a

“society for all ages”. It critically analyses EU law, policy, and discourse based on the three criteria set out in the Charter of Fundamental Rights—*dignity, independence, and participation*—to discuss the EU’s record on promoting equality for older people and to suggest how future EU action can be framed so that it effectively meets the Charter’s objectives.

21.3 Key EU Milestones and Their Limitations

21.3.1 EU Anti-discrimination Legislation

Arguably one of the key achievements in the EU’s fight against ageism is the 2000 directive establishing a framework for equal treatment in employment and occupation, also known as the Employment Framework Directive (Council of the European Union 2000). This law has provided minimum standards throughout Europe and has led to positive reforms at the national level (Tymowski 2016). It has moreover helped to challenge structural inequalities in the labour market, such as upper age limits in job advertisements (European Commission 2014).

However, as explained in a previous chapter (2018; Chap. 20), Article 6 of the Employment Framework Directive allows member states to apply a wide range of exceptions to the rule of age equality in order to fulfil their social and employment objectives. For example, it is legitimate to offer professorships to younger people as a means of encouraging recruitment in higher education (see, for example, *Vasil Ivanov Georgiev v. Tehnicheski universitet—Sofia, filial Plovdiv. Joined cases C-250/09 and C-268/09*, 2010). For O’Dempsey and Beale (2011), direct discrimination on the basis of age does not appear to be exceptional, which “creates an inherent vulnerability at the heart of the prohibition of age discrimination, and means that a careful balance has to be struck in order to ensure that the prohibition is meaningful” (p. 5). This broad discretion afforded to national jurisdictions to set aside equal treatment in old age has led to diverging national practices and levels of protection against age discrimination across the EU (Tymowski 2016).

Another shortcoming of this legislation is that it fails to extend reasonable accommodation to older workers. The concept of reasonable accommodation creates a duty to make necessary adjustments so that individuals can gain access or perform tasks, which otherwise they would be unable to. This right, which, according to Nikolaidis (2015), is inextricably linked with equality, at the moment only exists for people with disabilities. Yet giving older people a right to flexible working, adjustment of the work environment, and arrangements to support informal care provision makes economic sense and also increases equality of opportunities for senior workers. However, to date, there is limited discussion on extending reasonable accommodation beyond disability and what discussion there is is only at

a theoretical level.² To move from theory to practice the EU would need to revise its legislation and should also ensure that future initiatives on work-life balance take due account of the interdependencies between the working population and retired people, with both sides occasionally providing financial support and care for the other age group.

Moreover, the EU law does not extend protection from age discrimination outside the field of employment. In 2008, the European Commission prepared a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation (European Commission 2008b). If adopted, this piece of law would complete the EU framework by affording to the above discrimination grounds a similar level of protection as currently exists for race and gender under EU law (European Commission 2008a). However, 8 years after the initial proposal, the directive is still stuck in negotiations, due to strong resistance from a few member states and despite the promise of the current Commission that the so-called “horizontal directive” would be passed within a year of its election. Due to this lack of coverage of other areas it can be argued that there exists a “hierarchy of grounds”, whereby EU law protects more comprehensively against discrimination on some grounds than on others (Fundamental Rights Agency 2012).

With regard to age discrimination, the draft directive includes an exception for financial services, for which age can be used as a proxy when it is a determining factor for the product or service in question (Article 2§7, European Commission 2008b). In addition, there is a general clause allowing public and private actors to apply measures which discriminate on the ground of age as long as they can be justified by a legitimate aim. This draft provision (Article 2§6), which is similar to Article 6 of the Employment Directive, allows for a broad range of measures to be objectively justified as non-discriminatory. Such measures include situations where appropriate age differences might be needed, as for instance children’s toilets, children’s airfares, or age limits for selling alcohol.

In 2015, the Latvian EU Presidency included a new exemption for preferential pricing in respect of specific age groups in the draft directive (Article 2§6c, Council of the European Union 2015b). The [proposed new text by the Latvian Presidency](#) allows *any* preferential charges, fees, or rates in respect of persons in a specific age group not to constitute discrimination. This new clause creates open-ended opportunities for commercial actors to apply different prices for specific age groups. Although intended as a means for seniors or young people to benefit from special tariffs and services, it does not exclude purely commercially driven risk assessments. In the point of view of AGE Platform Europe, the representative network of older people at the EU level, this addition weakens the principle of age equality and practically excludes older people from the scope of the directive (AGE Platform Europe 2015a).

²For a notable exception, see Bribosia and Rorive (2013).

At the very least, this long list of exceptions seems to be telling us more about when discrimination is acceptable than when it is not. Not only do these exceptions complicate the negotiations of the draft directive, but they also enhance the view that old age disadvantages are unavoidable and therefore acceptable (Calasanti et al. 2006). Failing to enshrine a universal protection from age discrimination, old age is perceived as a relevant criterion of social structures rather than as a source of systematic inequalities. In its report on the implementation of the Employment Directive, the European Commission underlined that concerted efforts are needed to remove prejudices and “clarify the circumstances in which difference of treatment based on age may be justified” (European Commission—Research and Innovation 2014, p. 49). Undoubtedly, the even more complex set of exemptions foreseen under the horizontal directive makes it even more difficult to clearly demarcate which treatment is justified and which is discriminatory.

In this section I have argued that the provisions of both the Employment Framework Directive and the draft horizontal directive are susceptible to abuse. They can be used to limit the opportunities of older people to access employment, goods, and services and therefore breach the principle of independence. By considering age limits and proxies as valid and widely acceptable they therefore reinforce stereotypes of older people as different from the rest of the population and disregard their individual capacities, which offends their human dignity and may lead to degrading treatment. They do not distinguish between policies that enable participation and measures that lead to exclusion of certain groups and therefore they also fail to promote equal participation.

Instead of endorsing and justifying blunt age limits, in order to comply with the Charter's objectives, EU legislation and its interpretation by the CJEU should build on the benchmarks of Article 25 to define whether a treatment is discriminatory or not. Article 25 requires us to ask whether differential treatment—be it in the form of “justified discrimination” or positive action—facilitates the participation of older people in public, economic, social, and cultural life or rather impedes their dignity and independence and therefore breaches their rights. This is a simple test but also a fundamental change in mindset that is necessary to deliver the promise of age equality and to challenge ageism with the same rigorousness as with other forms of discrimination. Indeed, it is not so long ago that distinctions on the basis of one's sex were also considered to be “objectively justified”. For example, a 1961 case of the Italian Constitutional Court considered female adultery as more serious than male adultery and therefore approved the differential treatment of men and women on this matter (de Witte 2010). EU law has been instrumental in levying gender-based stereotypes and breaking down the barriers to the equal participation of women. To tackle injustice and prejudices based on age, the EU needs to abandon its conservative outlook on age-based distinctions and inspire an anti-ageist vision across its legal and policy framework.

21.3.2 *EU Policy*

Policy action complements the Union's legislative competence and can provide useful guidance on how to address systemic forms of ageism. The EU addressed ageing for the first time in 1982 in the European Parliament Resolution “on the situation and the problems of the aged in the European Community” (European Parliament 1982). Seizing the momentum of the first World Assembly on Ageing that took place in the same year, this resolution underlined the EU's responsibility to take measures, including reallocating the budget, to help older citizens. It moreover reaffirmed older people as citizens with equal and full rights. Several age-related policy proposals followed. Notably, in 1990, the European Council adopted a Decision on “Community Actions for the Elderly” (Council of the European Communities 1990), which prescribed priority actions aiming at their integration and declared 1993 as the European Year of the Elderly and Solidarity Between Generations. These early policy directions provide a relatively comprehensive roadmap for promoting older people's participation and independence and view seniors as citizens with full rights.

Since then, EU legislation, funding, research, and policy coordination in the field of ageing has been well developed (European Commission 2012b). These activities range from adopting senior employment strategies and addressing the risk of elder abuse to promoting lifelong learning and funding research on new technologies that can, among other things, support older people's stay at home (AGE Platform Europe 2012). For example, the EU has set up a platform for exchange among private actors that have signed onto “diversity charters”—voluntary commitments to fight discrimination, including on the grounds of age—in the workplace (European Commission 2015d). These policy tools have a potential to promote the three aspects of substantive equality, but they also entail some gaps.

The last time the Commission made explicit its commitment to fight against discrimination on age was in a communication that provided the baseline for the 2008 legislative proposal for a horizontal directive (European Commission 2008a). Moreover, the European Commission has not paid attention to the widespread age limits that exist across the region in access to health services; neither has it addressed age discrimination against older people with disabilities, despite the fact that it is bound by the UN Convention on the Rights of Persons with Disabilities (UN CRPD) (United Nations General Assembly 2007) and complements member states' efforts to materialize the rights therein (AGE Platform Europe 2016).

Even without the adoption of the draft horizontal directive, the Commission has the possibility to address the (in)validity of age-related criteria in soft policy measures and in the implementation of existing mechanisms, such as its “Disability Strategy” (European Commission 2010). Tolerating age-based distinctions, failing to provide guidance for member states on how to apply equal treatment in all ages, and lacking a cohesive approach to the fight against age discrimination gives a message of older people as potentially being less deserving of health care, support in case of disability, and overall equal treatment.

On the other hand, the European Commission financially supports NGOs, such as AGE Platform Europe, which brings together older people's associations from across the EU. Through its funding, the Commission indirectly empowers older people and facilitates their participation in decision-making. It also promotes a positive image of old age and supports older people to become active citizens. Nevertheless, the Commission does not consistently consult representatives of older people in dossiers of direct relevance to them, thus failing to attain their equal participation. For example, AGE Platform Europe has deplored the lack of involvement of older people in the implementation of the UN Convention on the Rights of Persons with Disabilities, despite the EU's rhetoric about the relevance and direct application of this treaty for a large part of the older population (AGE Platform Europe 2015b). The NGO has also stressed that older people are rarely consulted by the Council when the rights of older people are discussed.

EU-funded research can help to understand discrimination in old age and provide the evidence necessary for adopting or adjusting policy action. While EU research in the field of ageing is relatively developed,³ one still comes across age limits in data collection and/or the use of age categories that are too broad, such as "the 65+ population". For example the Fundamental Rights Agency (FRA), an EU advisory body, included age limits in a recent study on violence against women and failed to include older people in the sample of a project on the rights of people with disabilities (Fundamental Rights Agency 2014a, b). These generalizations treat older people as a homogeneous group and do not reflect the living realities and challenges in different stages of the lifespan. Associating "the old" with a fixed set of characteristics is demeaning and a violation of their human dignity.

On a positive note, in 2015, age discrimination and the rights of older people were included for the first time in the EU's Action Plan for Human Rights, which is a roadmap for the Union's relations with third countries (Council of the European Union 2015a). Under priority 16 the Action Plan mentions, "Increase awareness of the human rights and specific needs of older persons paying particular attention to age based discrimination." Unfortunately, this commitment is not mirrored in the EU's internal affairs, where "there is a lack of a coherent policy and legal framework to enhance the enjoyment of the rights of the elderly" (Lassen et al. 2014, p. 107).

To justify its inaction, the European Commission has argued that the primary duty to deliver age equality and fulfil the rights of older people falls within the competences of member states and limits its obligation to *respecting* the rights of older people—that is, to refrain from action that deliberately impacts the enjoyment of these rights (European Commission 2016c, p. 89). Although the same claim can be

³The creation of the European Equality Law Network, a group of legal experts on non-discrimination, which provides analysis on issues of equality across European states, is a positive example. Other examples include the funding of the Survey of Health, Ageing and Retirement in Europe (SHARE), the Active Ageing Index, and several studies on experiences of discrimination (Eurobarometer). Eurofound, the European Foundation for the Improvement of Living and Working Conditions, has compiled an impressive set of research on ageing, with a focus on work, retirement, and care.

made for the rights of other groups at risk of discrimination, the EU has only used this argument for older people. As a matter of fact, the Union has an extensive policy framework for the protection of women: in 2010 the EU launched a “Strategy for the Equality Between Women and Men,” which was recently extended to 2019 (European Commission 2015e). The European Commission also enshrined its priorities in the field of disability in the “Disability Strategy” (European Commission 2010) and adopted an “EU Agenda on the Rights of the Child” (European Commission 2011). Other equality initiatives include the “EU Framework for National Roma Integration Strategies” (Council of the European Union 2011), the “List of Actions by the Commission to Advance LGBTI⁴ Equality” (European Commission 2015c), and several soft and legal measures to promote the rights of children, racial, ethnic, religious, and linguistic minorities as well as to tackle intolerance (European Commission 2016c).

Overall, EU bodies prefer an ad hoc and opportunistic approach to ageing; while this can help to promote independence and participation in the labour market, at the same time it does not reflect the broad aspirations inscribed in the EU’s early texts, which were based on equality and rights. Ageing policies are nowadays primarily driven by economic arguments and as a result the policy framework on active ageing and the silver economy⁵ is a lot more developed than actions to combat poverty, exclusion, elder abuse, and discrimination. References to the rights of older people in human rights reporting by the European Commission, the European Parliament, and the European Council are scarce and unsystematic (AGE Platform Europe 2013). At the same time, ageing and older people are not “mainstreamed” in other areas, such as disability, in the same way that, for instance, gender is.

Compared to other discrimination grounds, the EU has deprioritized age discrimination and older people’s issues (AGE Platform Europe 2014b). This results in soft, incoherent policies, which fail to establish age discrimination as wrongful and to politicize the fight against ageism. To achieve the threefold objectives of substantive equality, the EU needs to open up a dialogue on how to extend and scale up its activities to fight age discrimination and how to ensure consistency and avoid gaps in its existing array of work.

21.3.3 The Legacy of the European Year 2012

An exception to the residual concern of the EU for older people was the European Year on Active Ageing and Solidarity Between Generations (EY2012). During this year, the Union put a spotlight on older people and aimed at, among other things, promoting activities “which will help to combat age discrimination, to overcome

⁴Lesbian, Gay, Bisexual, Transsexual and Intersex.

⁵According to Eatock (2015), “The “Silver Economy” can be defined as the economic opportunities arising from the public and consumer expenditure related to population ageing and the specific needs of the population over 50” (Eatock 2015, p. 2).

age-related stereotypes and to remove barriers” (European Parliament & European Council 2011, art. 2). However, the expectations set out for the year were relatively low: EY2012 was intended as a framework for the mobilization of stakeholders to foster awareness raising, exchange good practices, and convey a more positive image of population ageing and did not aim at extending the scope of age discrimination at EU and national levels. Despite lacking a real potential for measurable impact on the ground, EY2012 offered funding opportunities for national authorities to develop comprehensive strategies on active ageing, which “are about changing attitudes and developing a more positive approach to tackling the challenges of ageing” (Zaidi 2015, p. 2). While it is out of the scope of this chapter to explore how EY2012 influenced action at a national level, it is certain that follow-up initiatives are needed to translate the political momentum into a “strong political legacy that delivers concrete results” in the long term (Council of the European Union 2012).

However, some tools developed during EY2012 may serve as building blocks for anti-ageist policies. “Guiding Principles on Active Ageing and Solidarity Between Generations” (Council of the European Union 2012) provides a roadmap for such action. This document, which was adopted by the Council in December 2012, makes specific reference to age discrimination, but only focuses on the labour market. Moreover, at the EU level, following EY2012, the active ageing agenda has been integrated into existing EU frameworks, in particular in “Europe 2020”, which is the EU’s strategy for “smart, sustainable and inclusive growth” and includes the “European Innovation Partnership on Active and Healthy Ageing” (European Commission 2012a). These initiatives have a strong focus on increasing the participation of older people in the labour market and ensuring the sustainability of health and social care systems through innovative mechanisms. Whilst these actions have the potential to support independent living in old age, they lag behind in effectively promoting dignity and participation beyond the economic sphere.

Almost 5 years after EY2012 we are witnessing the deficiency of EU policies in living up to the commitments made during the European Year. Despite its focus on active ageing, age discrimination in the labour market has not waned; older workers are still penalized despite research that shows that their productivity and expertise increase in old age (European Commission 2014, p. 49). Negotiations on the horizontal directive have not advanced, and the European Commission has not included older people’s rights or age discrimination in its work priorities and “is concentrating its action on the rights of children, women, persons with disabilities” (Parent 2015, p. 3). In fact, the portfolio of the Commissioner for Justice, Consumers and Gender Equality does not include any reference to age discrimination, with the exception of the horizontal equal treatment directive (Juncker 2014a). EU policy initiatives on ageing thus seem to be consistently downgraded into actions that view older people as service users or consumers, and the actual impact of EY2012 remains questionable. As a result, the recently announced “European Pillar of Social Rights” will concentrate on work-related rights (European Commission 2016a).

Drawing attention to the older workforce and to financial gains reflects the hierarchy of the economic over the social in EU policymaking. The EU action on old age is characterized by an *à la carte* approach, which does not encompass all forms

of exclusion and fails to recognize the multiple roles played by older people in society. Looking at old age only through the lens of employment and social protection assumes that older people are either active in the labour market or in need of care and protection. The following section explores whether the EU's discourse on ageing reflects the diversity of the group or rather ignores older people's equal rights as citizens and human beings.

21.4 Ageist Discourse and the Diversity of Older People

21.4.1 *The Elder Burden Narrative*

Although age-inclusive laws and policies can considerably improve the lives of older people, when institutions, structures, and behaviours are underpinned by ageist assumptions, older people face significant disadvantages in their participation in society. EU policy action aims at “confronting demographic change” (European Commission 2005), “dealing with the impact of an ageing population” (European Commission 2009) and the “dramatic changes in the age structure in the EU” (European Commission—Economic and Financial Affairs 2015, p. 1). It highlights the financial implications of demographic ageing, engaging in a discourse on dependency, and the so-called “elder burden”. Yet it has been argued that this narrative of the burden of older people creates a new form of ageism, imposes various forms of societal barriers, and nourishes intergenerational conflict (Walker 2015).

An illustrative example of this prejudiced approach is the 2015 Ageing Report, which presents a mere macroeconomic analysis of the costs of ageing and consistently uses old age as a proxy for declining abilities and increasing needs (European Commission—Economic and Financial Affairs 2015). By contrast, the 2015 Youth Report presents a comprehensive account of the situation of young people, how the economic crisis influenced them, and what actions the EU should take to address them (European Commission—Youth 2015). The choice of authors of the two documents is indicative of the different lenses through which EU institutions view ageing and youth: the former is drafted by the European Commission's financial service unit, the latter by the Directorate General for Education and Culture, which is in charge of youth policies. Thus, ageing is considered at the macro level and in relation to the financial implications it brings, without considering aspects of individual ageing and older person's rights. On the other hand, youth benefits from a comprehensive approach that reflects on societal barriers to their active inclusion, as well as EU initiatives to promote it.

Certainly economic concerns linked with demographic ageing are not only inevitable but also to a large extent legitimate. However, the pursuit of socioeconomic objectives, such as ensuring the sustainability of social protection systems, promoting youth employment, and improving the capitalist function of the market, needs to be accompanied by a reflection of how older people can be empowered as citizens

with full rights and responsibilities to participate in employment and education and contribute to social, political, cultural, and economic life.

Besides, the presentation of ageing as a profound social challenge resembling acute financial and economic crises is per se ageist, as it fosters a view of old age as a life stage of unmet needs rather than as a period of productivity, growth, and equal opportunities (Huenchuan and Rodríguez-Piñero 2011, p. 20; Thompson 2005). Framing ageing policies based on dependency ratios assumes that everyone 65 and over is not working or contributing in another capacity to the economy and to society. Not only are working lives across the EU gradually extending beyond this threshold, but also a large number of older people contribute in the informal sector, in particular, as volunteers and caregivers (Ehlers et al. 2011). In addition, the older generation represents unexploited social capital as mentors and socio-political actors in their communities. Sustaining a view of old age through a dependency lens diminishes older people's role, ignores their multiple contributions to society, and equates ageing with unproductivity, impairment, and leisure. It thus legitimizes and reinforces older people's marginalization, including by providing them with fewer and lower quality services (Fredvang and Biggs 2012).

Instead of merely focusing on old age as a bounty, policies need to equally address investments in ageing as an opportunity. The previous part of this chapter provided evidence of an asymmetric response to an ageing society. This policy thinking is worrisome from a social justice perspective, as it does not empower older people to use their accumulated knowledge and life experience for the benefit of society. This approach moreover, ignores how structural ageism, which is inherent in legal, social, and economic institutions, diminishes older people's life chances (Scrutton 1990, p.21, as cited in Duncan 2008; Macnicol 2006).

21.4.2 Ageing as a Disability

The EU shares the viewpoint that there is an important overlap between age and disability-related issues and suggests viewing older people's vulnerability from a disability angle (European Union 2011). This approach ignores the idea that "growing older should not be a disability in itself" (Morgan and David 2002, p. 436). It moreover disregards the diversity of the older age group, since although the prevalence of disability increases with age, approximately half of the 65 + generation across the EU does not encounter disabilities (Grammenos 2013). It also impedes a due consideration of the distinct challenges of old age and the social factors that impact older people's lives.

Ageism is not the same as "disablism," although older people may be victims of both (Thompson 2005, p. 72). Old age is a period of systematic inequalities in distributions of power, roles, and resources, which unless acknowledged are likely to be seen as natural, and thus beyond dispute (Calasanti et al. 2006, pp. 17–18). It is these structural disadvantages and stereotypes that, in association with disability and other characteristics and experiences, such as gender and race, may lead to

multiple discrimination. Using the disability legal and policy framework to provide adequate responses to specific issues that affect older people, such as access to formal and informal services, accessibility, and others, is an important tool for ageing advocates. However, equating old age with disability is an unwelcome stereotype, since it narrows the scope of old age needs, challenges, and contributions solely to those related to impairment.

21.4.3 The Active Ageing Trap

The “active ageing” paradigm has potential as an alternative to the idea of older people as dependent, disabled, or vulnerable. Drawing on the work of the World Health Organization (WHO) (World Health Organization 2002), for the EU “active ageing” involves releasing older people’s potential by helping them “stay in charge of their own lives for as long as possible as they age and, where possible, to contribute to the economy and society” (European Commission—Employment Social Affairs and Inclusion n.d.).

According to Moolaert and Biggs (2012), however, the originally holistic active ageing narrative has been restricted through EU practice to a notion intrinsically linked with economic productivity. Although the EU framework has evolved since Moolaert and Biggs made the above remark—as shown in the previous part of this chapter—the EU maintains a utilitarian ageing agenda which largely focuses on people of good health who can contribute to its economic growth: its threefold approach includes increasing “senior employment”; investing in the silver economy; and improving the sustainability of social protection systems (European Commission 2015b; European Commission—Research and Innovation 2014).

Anti-ageist agendas that are driven by concerns about the economy and not about older people are likely to undermine their interests (Duncan 2008). In particular, the Silver Economy initiative (European Commission 2015b) adopts a consumerist approach targeting mainly older people with a secure income but also indirectly the families of those who need support and care and might benefit from innovative market-based solutions. Not only does this frame see older people merely as consumers and not as citizens with full rights and responsibilities, but it also risks forcing out of its remit all those who do not consume. As former UN Secretary-General, Kofi Annan, once said, “A society for all ages is one that does not caricature older persons as patients and pensioners. Instead, it sees them as both agents and beneficiaries of development ... it seeks a balance between supporting dependency and investing in lifelong development” (Annan 1998).

In addition, despite being at least to a certain extent helpful in providing an image of ageing which is powerful, positive, and dependency-free, active ageing strategies may exclude people who are very old, isolated, or suffering from severe impairments (Priestley 2003). Although extremely relevant as a preventive concept,

this approach has its limits in addressing older people who may already be in a vulnerable situation. Just like consumerism, active ageing policies encourage individual responsibility to cope with the challenges of ageing and alleviate the societal burden. They are more concerned with what older people can do to avoid the collapse of the health and social security systems, rather than with what the state can do to serve older people and proactively confront demeaning attitudes about old age, as well as the intersection of old age with race, disability, and gender, among other factors. These intragenerational inequalities are often more widespread and pervasive than intergenerational inequities (Duncan 2008). Unless active ageing is understood to be more than economic participation or consumerism, policies cannot avoid the damaging and diminishing effects of social constructions of old age. Regardless of the intention to empower older people, active ageing strategies probably have little impact on those older people who assume different roles or purposes in later life, such as those oriented towards the community or self-growth, and those who struggle to live independently and be included in their communities.

Our societies tend not to make a distinction between active and inactive childhood, motherhood, or adulthood. However, active ageing is seen as the standard that older people need to achieve in order to benefit from state protection as full citizens. As long as active ageing agendas dictate what older people should and should not be doing, they may be perceived as patronizing but also as excluding those who deviate from the norm. Moolaert and Biggs (2012) suggest moving instead toward agendas of “desired ageing,” which are flexible and respectful of older people’s autonomy to live their lives as they wish.

On the one hand, active ageing and silver economy initiatives can help disentangle old age from the stigma of inevitable decline, burden, and worthlessness and thus may have a strong anti-ageist effect. On the other hand, by overstressing older people’s economic contribution and individual responsibility, they fail to reflect the diverse experiences and wishes of older people and the societal disadvantages that they may face, such as poverty, social isolation, loneliness, role loss, discrimination, and abuse. Positive stereotypes of ageing can, therefore, also be ageist insofar as they “deny and downgrade their distinctive needs and actual and potential contributions, and question the legitimacy of old age per se, and they especially denigrate those who cannot conform” (Duncan 2008, p. 1152). Instead of normative labelling, we need a holistic approach to ageing, which includes all the good and bad things associated with old age, just like with all other parts of life. This is why active ageing strategies need to be accompanied by a rights-based political agenda outlining public responsibility to respect the autonomy of older people and support them in their diverse roles and expectations of old age.

21.5 The Potential of a Rights-Based Approach to Fight Ageism

The two previous sections of this chapter argued (a) that the consistent downplay of older people's rights within the EU framework is emblematic of the injustice faced by this group, and (b) that current conceptions of older people by the EU—whether as burdensome, disabled, or active—have failed to address the diversity of the older population and inspire a society for all ages. Even outside times of economic and refugee crises older people have attracted little, if any, attention as subjects of rights. Discrimination against older people, although prevalent across all EU countries and extremely pervasive in its manifestation and effects on older people's personhood, autonomy, and security, has neither induced public outrage nor a body of standards to confront it. This last section explores how a human rights-based approach (HRBA) can be operationalized as the EU's antidote to ageism.

The HRBA is gaining traction worldwide as an effective way to address in a systematic and comprehensive manner the disadvantages and prejudices linked with old age (Bras Gomes 2011; Chung 2010; UN Department of Economic and Social Affairs 2009; Doron and Apter 2010; Duncan 2008; Fredvang and Biggs 2012; Hammarberg 2011; Mégret 2011; Pillay 2014; Quinn 2013; Stuckelberger et al. 2012; Tang and Lee 2006; Townsend 2006). An HRBA shifts the focus towards state obligations to remove social injustices faced by individuals in their jurisdiction. It creates a duty to promote equality and emphasizes seeing older people as holders of rights. The added value of this approach compared to the welfare or neoliberal models often reflected in EU policies is that, whereas the realization of human rights requires the organization of socio-economic policies, the HRBA goes beyond economic arguments as the *raison d'être* of such policies. It does not target only those who are privileged, healthy, or have money, nor does it aim only at action that is cost-efficient, but focuses on the full and equal realization of human rights for all. Hence, it has the potential to make the most positively impactful policy changes for older people and for society as a whole.

Counter arguments to this approach will necessarily reflect the economic costs of a comprehensive rights agenda. Although it is outside the scope of this paper to do a cost-benefit analysis, its thesis is that the current status quo is not only bad for older people, but for society as a whole, as ageism impedes older people from becoming full agents in their communities. Lifting age barriers in preventive screening can enhance the health and therefore the employability of older workers. Providing reasonable accommodation to informal caregivers will allow older people to stay longer in the labour market, while relieving the state from the obligation of formal assistance to those in need. Providing training without age limits breaks the cycle of long-term unemployment as older people can more easily re-enter the labour market. Better transport and services will not only improve older people's

independence and participation but it will also allow them to travel, consume, and volunteer. Investments in health and accessibility lead to savings for the funding of long-term care. Economic objectives can only be partially achieved unless wider societal issues are tackled. As Fredman and Spencer (2003) suggest, "The real question then becomes not what is the cost of age equality, but how should the cost be equitably distributed among the three main possible cost bearers: employer, the state and the individual or the family" (p. 4).

The EU's current approach to ageing is full of paradoxes: on the one hand, it reproduces stereotypes of older people as burdensome and useless; on the other hand, its concentration on labour market participation assumes exactly the opposite. The tolerance of age limits across EU countries results in situations where people 65+ in the same country are considered capable of working but too old to drive and to receive preventive treatment. Upper age limits in travel insurance also create barriers to intra-EU freedom of movement, damaging the targets of "senior tourism" and the silver economy. The EU promotes longer working lives while at the same time maintaining mandatory retirement ages. Obviously many of these cases do not make economic sense. As Blaikie (cited in Macnicol 2006) observed, "the reasons behind discrimination are frequently economic, but the capacity to maintain oppression is primarily psychological" (p. 11).

These considerations should encourage us not to jump to conclusions about the cost of an HRBA, at least not before considering the cost of the alternative. Instead of only proposing ambitious special measures for older people, an HRBA focuses on tangible actions, which require a shift in the mindset and some procedural aspects of EU institutions. Its premise is that while progress will be gradual and lengthy, as an immediate next step a lot can be accomplished just by equally factoring older people into EU decision-making.

The new Commission has appointed its first Vice-President in charge of "ensuring that every Commission proposal or initiative complies with the Charter of Fundamental Rights" (Juncker 2014b, p. 4). Vice-President Timmermans is expected to mainstream fundamental rights across all EU actions. The proposal for an integration of an HRBA across all EU policies is, therefore, timely and consistent with the EU's aspirations.

The following paragraphs explore how EU action can be reframed to comply with an HRBA, based on the framework developed by Amnesty International and the International Human Rights Network (2006). Their methodology embraces the following five principles: express application of the human rights framework, empowerment, participation, non-discrimination, and accountability (Amnesty International & International Human Rights Network 2006). Each of these methods is analysed below, with suggestions for concrete ways in which they can be operationalized by the EU.

21.5.1 Express Application of the Human Rights Framework

This chapter has provided anecdotal evidence of EU policy being driven by the *needs* of an older population. Using this criterion, instead of the fulfilment of rights that the EU adheres to in its founding treaties, makes the obligation to respect and promote these rights appear contingent and reversible.

Applying the first principle of the HRBA in EU policies on ageing and older people would entail first and foremost looking at how Articles 21 and 25 of the EU Charter of Fundamental Rights has shaped EU action, translating intentions into means. Secondly, an HRBA would rebalance the EU's action on ageing by covering areas unrelated to economic or utilitarian concerns. Thirdly, EU officials would be trained and encouraged to consistently consider the impact of their decisions and budget allocation in making assessments of the rights of older people.

Expressly referring to the rights of older people would tear down the barriers between different policy sectors and give visibility to older people as rights-holders. Without necessarily creating a branch of human rights specific to older people, this could act as a comprehensive and coordinated approach to older people's fundamental rights, which would ensure uniformity, policy coherence, and synergies between initiatives taken at different levels and by various services. It would strike a balance between the competing paradigms of dependency and active ageing that prevail across EU policy, based on the vision set forward by the EU Charter of Fundamental Rights, its founding treaties, and international human rights conventions ratified by the EU—in particular, the UN Convention on the Rights of Persons with Disabilities (UN CRPD) (United Nations General Assembly 2007). “Mainstreaming” would become an obligation for all EU bodies, who would have to look at old age through a human rights lens. As a result, the rights of this group would not be ignored or set aside but would be placed “at the heart of its activities” (European Union 2016, Preamble).

21.5.2 Empowerment

Empowerment means ensuring that policies allow older people to participate equally in society, not to be considered as “charity”. The EU has a long history of social policies for older people, but it treats them as beneficiaries and not as rights holders (Martin et al. 2015). Applying this principle, the EU should move away from the dependency and burden paradigm. It should abandon the stereotypical portrayal of older people as senile, unproductive, and frail. Nor should it dictate to older people what they ought to do to remain active, but rather support them in making autonomous choices for their lives. It could also reject the dependency ratio as a measure of older people's value in order to reflect both the extended working lives of older people and their economic contribution as volunteers, informal carers,

grandparents, and so on.⁶ It should engage in an empowering discourse that does not adopt old-age biases and perceptions of ageing as something negative that is to be avoided and fought against. This narrative needs to be reflected across all of the EU's action and funding, by scrutinizing new initiatives and research projects. For example, although the majority of EU-funded projects promote positive images of old age, the IMI SPRINTT project, which aims to prevent physical disability, claims that "the real challenge is to fight ageing" (AGE Platform Europe 2014a; SPRINTT Project 2014). Rather than seeing ageing as something to be fought against, old age should be acknowledged as a period full of resources and opportunities.

Moreover, efforts are to be made to ensure a common understanding of age equality and the rights of older people. By encouraging a welfare approach to old age, the EU puts an emphasis on servicing older people's needs rather than building their capacity to understand and claim their rights. Older people should be made aware of the existing legal framework and how it relates to their everyday lives and the policy developments at the national and EU level. They need to know their rights and responsibilities, the duties of state and private actors to respect, protect, and fulfil them, as well as the processes that are available for them to claim their rights and bring about positive reforms. This could be achieved through EU-wide awareness-raising campaigns and funding initiatives at local and national levels that aim at empowering older people to take up various roles in their communities. Overall policies should give older people the power and capacities to improve their lives, allow them to raise their voices, to contribute and to be heard by decision-makers, without making them passive subjects.

21.5.3 Participation

The principle of participation is a call for policies that allow for a genuine participation of older people, including the most marginalized and minority groups. Participation in policy and legal processes can take the form of involvement of representative civil society organizations with anchors at grass-roots level. It presupposes timely and accessible information so that participation is constructive and meaningful.

AGE Platform Europe has deplored the inconsistent consultation of older people across EU policies and called for the inclusion of older people in all policies that concern them (AGE Platform Europe 2015b). There is certainly room for improvement by systematically including old age advocates in related bodies (such as the High Level Group on Disability and High Level Group on Non-Discrimination), processes (such as the European Innovation Partnership on Active and Healthy Ageing and the European Semester), and also by ensuring regular dialogues with institutions, such as the Directorate-General (DG) for Justice, Consumers and

⁶For an alternative, see Farrel 2016.

Gender Equality (DG JUST) and the DG for Employment, Social Affairs and Inclusion (DG EMPL), as well as formations of the Council, including the Council Working Parties on Human Rights (COHOM), Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP), and Social Questions. The EU could also consider setting up an inter-service group on old age—such as the one that exists on disability—that would inform and guide EU action, exchange information, and improve understanding of old age challenges and the EU's role to tackle them. Participation and inclusion of persons at risk of discrimination, such as older people, must also be supported by the EU Structural and Investment Funds. Such actions would ensure that involvement at the EU, national, regional, and local levels is accessible, transparent, and timely.

21.5.4 Non-discrimination

The HRBA seeks to end discrimination, paying due attention to causes and situations of accumulated disadvantages that may lead to multiple discrimination. Non-discrimination on the grounds of age is considered to be a general principle of EU law but EU institutions have not applied it directly to guide policy, case law, or to combat ageism. As explained earlier in the chapter, in practice, EU law is narrowly focused on employment and on a formal definition of equality that includes a negative obligation not to interfere.

Non-discrimination on the grounds of age needs to become a matter of priority in all EU policies. The EU should establish where age limits and proxies are appropriate and which are the factors that accentuate discrimination also beyond the workplace. Mainstreaming non-discrimination includes a comprehensive and connected consideration of older people across all EU actions, in a similar way that the EU has taken gender into account in every policy decision (Fredman and Spencer 2003).

The EU should also gather data so that difference in opportunities can be assessed. Data should be disaggregated by age and gender, avoiding large age cohorts (for example, 50+), and as far as possible avoiding age limits. Age discrimination needs to be consistently addressed in surveys, such as the Survey of Health, Ageing and Retirement in Europe (SHARE), which to date does not include specific questions on age discrimination. Moreover, resources should be allocated for empirical studies on old age inequalities, including those at the intersection of racial, religious, gender, disability, and other forms of discrimination. The Fundamental Rights Agency, in particular, should initiate and foster projects that put a spotlight on the social injustices faced by the older group.

21.5.5 *Accountability*

The allocation of equal rights to people of all ages represents an important element of fulfilling the EU's commitments (Economic Commission for Europe 2008). As we have seen in the first part of this chapter, the EU Charter does not provide for legally enforceable rights that individuals can claim from their governments and EU institutions. However, human rights are stripped of meaning unless they are accompanied by social and economic policies to support them. The principle of accountability is about identifying positive and negative obligations—for state and private actors and by extension for the EU—in order to move from commitments to tangible outcomes.

In concrete terms, the application of the principle of accountability requires a threefold effort. First, it calls for human rights impact assessments to identify the potential positive and negative impact of plans, budgets, and reform programmes, as well as the necessary policies to address it. However, the EU has not included the rights of older people in its country-specific recommendations in the area of equality (European Commission 2016b). Neither has the European Commission addressed the adverse impact of social reforms on healthy life expectancy, whereas there is evidence that while people are living longer, they live more years in ill health (AGE Platform Europe 2015c). In the future, austerity measures promoted by the EU should not disregard existing human rights standards but instead ensure that the structural disadvantages faced by older adults are taken into account in budgetary and macroeconomic reforms. Impact assessments are necessary to allow for planned reforms to address sustainability and deficit problems, without undermining the enjoyment of human rights.

Second, to respect the principle of accountability a set of specific, enforceable targets that can be used to measure the EU's performance internally and as a global actor in promoting age equality and confronting ageism could also be developed. To do so, the EU could take stock of existing international instruments, such as the Madrid International Plan of Action on Ageing (MIPAA) (United Nations 2002), which, although it is neither a bill of rights nor legally enforceable, includes a set of commonly agreed upon policy objectives. The EU could also promote the use of human rights indicators in order to monitor the progressive realization of economic and social rights under the ongoing reforms. In practical terms, this would mean that reforms should take into account the human rights implications of measures, as well as principles such as transparency, accountability, participation, and attention to the most vulnerable groups, including older persons.

Third, monitoring over time would ensure that there is a gradual improvement rather than deterioration of rights. However, the EU lacks an enforcement mechanism that reviews progress in mainstreaming age equality and the rights of older people. A service or dedicated body, including the Commission, civil society organizations, and representatives of the member states, might be needed to ensure

policy integration and “to link ageing to other frameworks for social and economic development and human rights” (Annan 2002, p. 1). A consistent application of the principle of accountability along the above lines will ensure that older people are factored into laws, policies, and institutions, allowing for a prompt response to threats or violations of rights.

21.6 Conclusion

The EU has an impressive legal and policy framework in place when it comes to other grounds of discrimination, but it misses the mark for old age (Lassen et al. 2014). This chapter outlines the EU’s narrow interpretation of its obligation to combat age discrimination and shows how it has not afforded ageism the visibility it deserves, bearing in mind that it is the most commonly experienced form of discrimination (European Commission 2015a). In fact, the EU’s ongoing austerity measures inadvertently increase the risk of inequality and exclusion (Parent 2015). Despite some remarkable achievements, including the Employment Framework Directive and EY2012, the EU has generally had a patchy approach to ageism. Efforts to enshrine anti-ageist objectives in active ageing and social policy agendas are to be encouraged, without ignoring their limits in terms of scope and impact, both because they have not been part of a well-developed set of mainstreaming actions and because they fall into the trap of “essentializing” older people either as vulnerable or active. Active ageing strategies are certainly useful elements in an effective approach towards non-discrimination and equal opportunities; but, “for anti-ageist policies and practices to be taken seriously in their own right, they have to be given the profile they deserve” (Thompson 2005, p. 59).

Moreover, policy action will be deficient if ageism persists in beliefs and policy thinking (Herring 2009, p. 13). This chapter shows that the EU is deeply conscious of population ageing but is less concerned with individual ageing and the human rights challenges related to ageing. The Union’s legal and policy framework have attributed social characteristics to chronological age, in particular, consolidating expectations about the relationship between work, retirement, and economic contribution. Old age has been defined as an indicator of incapacity, unproductivity, dependency, impairment, and burden. This vision of ageing not only sustains age-based stereotypes and categories but also legitimizes age discrimination and marginalization. The EU needs to set up more cohesive and effective mechanisms to rectify the structural inequalities and prejudicial disadvantages that serve to exclude older people. A human rights-based approach is particularly well suited to promoting equality and dignity in old age. It advances a vision of older people as rights-holders and guarantees an in-depth analysis of how EU law and policies affect the rights of older people and what further action is needed to materialize them, taking into account both individual and public responsibility.

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