

Countering online sexist hate speech in the European legal context: Between present commitment and future challenges

*Claudia Morini**

1. Preliminary remarks

In our societies new technologies ‘can play an important role in empowering women and girls to exercise all human rights, including the right to freedom of opinion and expression, and in their full, equal and effective participation in political, economic, cultural and social life’.¹ Women’s emancipation, therefore, is strengthened through the promotion of access to new technologies for all women; digital technologies can also play a significant role in facilitating women to exercise their human rights. Unfortunately, in a World more and more digitalized and connected, one of the most recent and worrying dynamics relates to the exacerbation of episodes of violence against women committed, assisted, aggravated, or amplified exactly by the use ICTs or other digital tools (known as cyber violence against women and girls – CVAWG).²

* Associate Professor of European Union Law, University of Salento. Coordinator of the Jean Monnet Module ‘EU-ProWomen – Protection and Promotion of Women’s Rights in the European Legal Order: from Gender Equality to Active Participation in the Democratic Life of the European Union’.

¹ UN HRC, ‘Accelerating efforts to eliminate violence against women and girls: preventing and responding to violence against women and girls in digital contexts’ (5 July 2018) UN Doc A/HRC/RES/38/5 para 2.

² In his ‘Report on online violence against women and girls from a human rights perspective’ (18 June 2018) the Special Rapporteur on violence against women, its causes and consequences elaborated a definition of ‘online violence and ICT-facilitated’ which reads as follows: ‘The definition of online violence against women [...] extends to any act of gender-based violence against women that is committed, assisted or aggravated in part or fully by the use of ICT, such as mobile phones and smartphones, the Internet, social media platforms or email, against a woman because she is a woman, or affects women disproportionately’ (UN Doc A/HRC/38/47 para 23). See, also, B Harris, L Vitis, ‘Digital



There are many different forms of CVAWG. Many could be seen as online extensions of practices perpetrated offline (eg online hate speech, cyber harassment or cyber stalking); however, different and unique forms of gender-based violence are perpetrated in the cyberspace (eg non-consensual intimate image abuse or doxing) and can amplify the scope of harm compared to violence perpetrated in the physical world. These practices are part of the *continuum* of violence against women and girls and represent yet another form of abuse and ‘silencing’ incorporated into existing gender-based ‘power structures’. Violent acts that occur through technology are an integral part of the same violence that women and girls experience in the physical world, for reasons related to their gender.³

According to the European Institute for Gender Equality (EIGE), CVAWG ‘includes a range of different forms of violence perpetrated by ICT means on the grounds of gender or a combination of gender and other factors (eg race, age, disability, sexuality, profession or personal beliefs). Cyber violence can start online and continue offline, or start offline and continue online, and it can be perpetrated by a person known or unknown to the victim’.⁴

Technological developments have contributed to a sharp increase in the number of ‘means’ used to make such practices happen. Tormentors have at their disposal a vast range of technological tools which, unfortunately, despite having facilitated our daily living, are increasingly used improperly to stalk, harass, and control victims.⁵

intrusions: Technology, spatiality and violence against women’ (2020) 4 J Gender-Based Violence 325.

³ On this topic see, for instance, A Van Der Wilk, ‘Protecting Women and Girls from Violence in the Digital Age’ (Council of Europe 2021) <<https://rm.coe.int/prems-153621-gbr-2574-study-online-a4-bat-web/1680a4cc44>>.

⁴ EIGE, ‘Cyber Violence against Women and Girls. Key Terms and Concepts’ (22 October 2022) 4 <https://eige.europa.eu/sites/default/files/documents/cyber_violence_against_women_and_girls_key_terms_and_concepts.pdf>.

⁵ This is why smartphones, computers, cameras, and other recording devices can become sharp weapons if they are misused. Furthermore, if expanding the notion of ‘cyber violence’ to the so-called “violence facilitated by technology”, this could lead to the inclusion of GPS or satellite navigators, smart watches, fitness trackers and smart home devices, as well as digital technologies dedicated to ‘control’ such as spywares in this list.



2. *Cyberspace and human rights: A complex coexistence*

Cyberspace can well be a ‘place’ in which human rights’ violations can occur: cyber harassment, cyber stalking, privacy violation, recording and sharing of images of sexual violence and online hate speech, represent the regrettable flipside of the most recent technological advancements. From a legal perspective, however, cyberspace features aspects that are so peculiar that make general regulation efforts, and especially persecution of alleged perpetrators, a very complex matter: against this background, investigative activities may in fact face relevant delays; furthermore, the assessment of the risk to which the victim is exposed may be particularly challenging, to cite a few examples.

Although the ‘setting’ is full of shadows, the digital space certainly represents a ‘place’ in which everyone can exercise one of the rights recognized as a true ‘essential element’ of our democracies, namely freedom of expression. Nowadays, the impact of technological innovation on freedom of expression – also due to the massive and rapid spread of social media – leads to a renewed reflection on the possible limits and balances with other rights to which this right can be subject: the protection of the dignity of the person is a clear example. It should be noted, in fact, that there are widespread social phenomena harming human dignity and, accordingly, representing an abuse of the right to freedom of expression of those who exercise it improperly: online hate speech is among them.⁶

To qualify a certain conduct as ‘hate speech’, three constitutive elements must combine: the expression of the will to incite hatred; incitement that can cause acts of hatred and violence; the risk of such acts occurring. ‘Privileged victims’ of such practice are often women and, among them, especially those who demonstrate emancipation from pre-established social roles: it is in these hypotheses that a peculiar manifestation of hate speech often materializes, namely online sexist hate speech.⁷

According to the Council of Europe, this practice can be referred to as ‘one of the expressions of sexism, which can be defined as any supposition, belief, assertion, gesture or act that is aimed at expressing

⁶ M Costello, J Hawdon, ‘Hate speech in online spaces’, in T Holt, A Bossler (eds), *The Palgrave Handbook of International Cybercrime and Cyberdeviance*, (Palgrave Macmillan 2020).

⁷ See D Ging, E Siapera (eds), *Gender Hate Online* (Springer 2019).



contempt towards a person, based on her or his sex or gender, or to consider that person as inferior or essentially reduced to her or his sexual dimension'.⁸

Online sexist hate speech is not only closely connected to freedom of expression, but it is equally connected to the prohibition of discrimination based on gender and to the struggle with violence against women.⁹

3. *The European context: The role played by the Council of Europe*

Looking at the role played by the Council of Europe in the fight against hate speech in general and online sexist hate speech in particular, it is crucial referring to a pivotal soft law act adopted in 1997 by the Committee of Ministers (Recommendation 97/20), according to which hate speech consists of those expressions that '[...] spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of threat based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minors, migrants and people of foreign origin'.¹⁰

This first definition was then enriched thanks to General Policy Recommendation no 15 of the *Commission against racism and intolerance of the Council of Europe* (ECRI): it specifies that, for the purposes of the recommendation, hate speech is defined as 'the act of fomenting, promoting or encourage, in any form, denigration, hatred or defamation towards a person or a group, as well as subjecting a person or group to abuse, insults, negative stereotypes, stigmatization or threats and the justification of all these forms or expressions of hatred mentioned above, on the basis of "race", skin colour, ancestry, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual

⁸ CoE, 'Combating Sexist Hate Speech' [2016] <<https://rm.coe.int/1680651592>>.

⁹ See, for instance, C Itzin (ed), *Women, Violence and Civil Liberties* (OUP 1993).

¹⁰ CoE, 'Recommendation No R (97) 20 of the Committee of Ministers to member states on "hate speech"' (adopted by the Committee of Ministers of the Council of Europe on 30 October 1997) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680505d5b>.



orientation and other personal characteristics or status'.¹¹ The greater awareness and sensitivity acquired over the last twenty years has produced a much broader definition which clearly includes sexist hate speech.

The Committee of Ministers' commitment to combating sexism, including in its online displays, specifically materialized with the adoption in 2019 of the *Recommendation on preventing and combating sexism*.¹² The first aspect that stands out is the inclusion of a shared definition of 'sexism', which includes any act, gesture, visual representation, oral or written proposal, practice, or behavior – based on the idea that a person or a group of people are inferior because of their gender – occurring in the public or private sphere, online or offline. Such conduct involves or has the effect of violating the dignity or fundamental rights of a person or a group of people and causes damage or suffering of a physical, sexual, psychological, or socio-economic nature.¹³

The Recommendation then focuses on various areas within which sexist attitudes and discourses – which maintain and reinforce gender stereotypes – can manifest themselves, fixing precisely on online sexism which is defined as 'endemic' throughout the European continent.

In 2020 a *Committee of Experts on Combating Hate Speech* was established to prepare a draft recommendation to address and regulate hate speech within the framework of human rights.¹⁴ The outcome of this activity was the *Recommendation of the Committee of Ministers to Member States on Combating Hate Speech* which, today, constitutes a document of fundamental importance as it proposes an overall strategy to prevent and combat hate speech, also with reference to its virtual dimension.¹⁵

¹¹ ECRI, 'General Policy Recommendation N. 15 on Combating Hate Speech' (adopted on 8 December 2015) <<https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>>.

¹² CoE, 'Recommendation CM/Rec(2019)1 on Preventing and Combating Sexism' (adopted by the Committee of Ministers of the Council of Europe on 27 March 2019) <<https://rm.coe.int/168093b26a>>.

¹³ With reference to online hate speech, while attacks against men are more often based on their opinions or professional skills, women can more easily become the object of sexist and sexual insults and invectives without any apparent reason.

¹⁴ <www.coe.int/en/web/committee-on-combatting-hate-speech/home>. In general, on hate speech see A Buyse, 'Dangerous Expression: the ECHR, Violence and Free Speech' (2014) 63 ICLQ 491; A Brown, *Hate Speech Law. A Philosophical Examination* (Routledge 2015); E Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016).

¹⁵ CoE Recommendation CM/Rec(2022)161 of the Committee of Ministers to member States on combating hate speech (adopted on 20 May 2022). According to this

Particular attention is in fact devoted to online hate speech. In this regard, the Committee asked States to define and outline the duties and responsibilities of state and non-state actors in addressing this scourge. Member States should also create clear rules and procedures for effective cooperation with and between such actors regarding the assessment and investigation of online hate speech. In relation to internet providers, the Committee calls on States to require those operating within their jurisdiction to respect human rights, including anti-hate speech legislation, to apply the principle of due diligence in all their operations and policies and, finally, to take measures compliant with existing regulatory frameworks and procedures to counter hate speech on their platforms.

The Parliamentary Assembly of the Council of Europe has provided an important contribution in this respect: the 2017 Resolution ‘Ending cyberdiscrimination and online hate’ states that ‘[h]ate speech is not limited to racism and xenophobia: it may also take the form of *sexism*, [...]’. Such forms of behaviour, which are not accepted offline, are equally unacceptable *online*. Just like the face-to-face world, the internet must provide space to be critical, without providing space for hate speech, including incitement to violence’.¹⁶ Yet there still exists some sort of reluctance to categorize sexist discourse as hate speech.¹⁷

Shifting to hard law, the 2011 *Council of Europe Convention on preventing and combating violence against women and domestic violence* (so called ‘Istanbul Convention’) has no specific reference to online sexist

Recommendation ‘hate speech is understood as all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as “race”, colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation’ (para 1.2) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a67955>. With this recommendation, the Committee asked the governments of the member countries to commit themselves to the development of strategies aimed at preventing and combating hate speech, leveraging the adoption of an adequate legal framework compatible with the principle of balancing of interests between respect for private life, right to freedom of expression and prohibition of discrimination.

¹⁶ PACE Resolution 2144, ‘Ending cyberdiscrimination and online hate’ (adopted on 25 January 2017) para 2 <<https://pace.coe.int/en/files/23457/html>>. See also K Barker, O Jurasz, ‘Online violence against women as an obstacle to gender equality: a critical view from Europe’ (2020) 1 Eur Equality L R 47.

¹⁷ DL Lillian, ‘A Thorn by Any Other Name: Sexist Discourse as Hate Speech’ (2017) 18 Discourse & Society 719.



hate speech.¹⁸ Nevertheless, an integrated and purpose-oriented reading of the Convention allows us to find important signs of condemnation of this practice. First, it is in the very definition of ‘violence against women’ that it is possible to find some of the typical consequences of sexist hate speech, that is, a violation of human rights and a form of discrimination against women, including all acts of violence based on gender.

A further element can be found in Article 12, according to which the Contracting States have the obligation to adopt the necessary measures to promote changes in the socio-cultural behaviour of women and men, to eliminate prejudices, customs, traditions and any other practices based on the idea of women’s inferiority or on stereotyped models of the roles of women and men. As is known, in fact, it is often precisely these cultural ‘deformations’ that are at the basis of online sexist hate speech. Furthermore, Article 40 (sexual harassment), explains that sexual harassment can also take the form of verbal conduct, the purpose or effect of which is to violate the dignity of a person, creating an intimidating, hostile, degrading, humiliating or offensive climate. In our opinion, therefore, online sexist hate speech could fall into this category and be subject to criminalization at state level.

Finally, Article 17 requires the Contracting States to define guidelines for the media sector aimed at preventing violence against women and strengthening respect for their dignity.

This said, it is worth recalling that, although the Convention does not explicitly take into consideration the conduct that is relevant for the purposes of the present analysis, its supervising body, the GREVIO, as widely aware of the fact that the digital dimension of violence against women is often overlooked by national laws and policies, has intervened on the matter by adopting *General Recommendation no 1 on the digital dimension of violence against women*.¹⁹ The Recommendation has introduced the definition

¹⁸ CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (2011) CETS No 210 (entered into force 1 August 2014).

¹⁹ GREVIO, ‘General Recommendation no 1 on the Digital Dimension of Violence against Women’ (20 October 2021) <<https://rm.coe.int/grevio-rec-no-on-digital-violence-against-women/1680a49147>>. On 30 September 2022 the Dublin Declaration on the Prevention of Domestic, Sexual and Gender-Based Violence was adopted by 38 Ministers of Justice of the Member States of the Council of Europe to proclaim zero-tolerance towards this heinous phenomenon and to confirm the commitment enshrined in the Istanbul Convention. Among the goals of this Declaration there is the promotion

of the ‘digital dimension of violence against women’, which includes both acts of violence perpetrated online – such as those related to the dissemination of humiliating images, and also to insults, death, and rape threats – and acts of violence carried out by using existing (or not yet invented) technologies.²⁰

4. *The European Union’s action against online sexist hate speech*

As a premise, it is worth noting that the phenomenon of CVAWG remains under-reported in the European Union and that there is a significant lack of comprehensive and comparable data available.

Then, we must recognize that, while identifying a single act specifically dealing with online sexist hate speech in the EU legal framework is not possible yet,²¹ the EU institutions have recently given encouraging

of an ‘institutional and political culture which rejects gender-based discrimination and violence, sexism, gender stereotypes and gendered power dynamics in the public and private sector [...]’ <www.gov.ie/en/publication/f34c6-dublin-declaration/>.

²⁰ For an interesting overview on the measures adopted by the Council of Europe to combat online hate speech see T McGonagle, ‘The Council of Europe against Online Hate Speech: Conundrums and Challenges’ Expert Paper MCM(2013)005 <www.ivir.nl/publicaties/download/Expert_paper_hate_speech.pdf>. See, also, Council of Europe, Gender Equality Strategy (2016), Combating Sexist Hate Speech, Strasbourg, <<https://edoc.coe.int/en/gender-equality/6995-combating-sexist-hate-speech.html>>. Furthermore, it is also important to recall that in the jurisprudence relating to the application of the European Convention on Human Rights (ECHR) regarding the contrast between hate speech and the European system of values, it is possible to find additional ‘traces’ of this commitment. See, for instance, *Pavel Ivanov v Russia* App no 35222/04 (ECtHR, 20 February 2007). *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003), para 40 and *Féret v Belgium* App no. 15615/07 (ECtHR, 16 July 2009) para 64; *Delfi AS v Estonia* [GC] App no 64569/09 (ECtHR, 16 June 2015); *Sanchez v France* App no 45581/15 (ECtHR, 2 September 2021). See, also, the complete guide on the Court’s case law dealing with hate speech <www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf>. The issue of the relationship between new technologies and the ECtHR had already been scrutinized more than a decade ago by C Murphy, ‘Works in Progress: New Technologies and the European Court of Human Rights’ (2010) 10 Human Rights L Rev 601.

²¹ In general, on the issue of gender-based violence against women’s criminalisation in European states, including ICT-facilitated violence, see the special report by S De Vido, L Sosa (2021) available at <<https://op.europa.eu/en/publication-detail/-/publication/25712c44-4da1-11ec-91ac-01aa75ed71a1>>. See, also, A Van der Wilk, *Cyber Violence and Hate Speech Online against Women*, European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, Brussels (2018) <[www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU\(2018\)604979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf)> and N Lomba, C Navarra, M Fernandes, *Combating*



signs regarding the development of an effective engagement strategy to protect women and their dignity in the European digital space.²²

In this regard, it should be noted that the European Union's action in the fight against discrimination and the promotion of gender equality dates back to the very beginning of the integration process and, above all, is deeply rooted in its legal system.²³ Actions aimed at overcoming the 'vulnerability' of the female condition as an obstacle to the full achievement of equality and emancipation also find valid support in the *Charter of Fundamental Rights of the European Union*.²⁴ Just as gender equality and the fight against discrimination based on gender are a pillar of the

Gender-based Violence: Cyber violence – European added value assessment, European Parliamentary Research Service (Brussels 2021) <[www.europarl.europa.eu/RegData/etudes/STUD/2021/662621/EPRS_STU\(2021\)662621_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/662621/EPRS_STU(2021)662621_EN.pdf)>.

²² In relation to the important role of freedom of expression in promoting women's empowerment, it is useful to recall UN HRC 'Resolution 23/2 (2013) on 'The role of Freedom of Opinion and Expression in Women's Empowerment' (adopted on 24 June 2013) in which it has been recognised 'the fundamental role that freedom of opinion and expression plays in the ability of women to interact with society at large, in particular in the realms of economic and political participation'. The Council had also stressed how 'the active participation of women, on equal terms with men, at all levels of decision-making, is essential to the achievement of equality, sustainable development, peace and democracy'.

²³ In this regard, it is sufficient to recall the provisions of arts 2 and 3 (3) of the Treaty on the European Union (TEU) and arts 8 and 10 of the Treaty on the Functioning of the European Union (TFEU); furthermore, by virtue of art 19 TFEU the Union can adopt specific legislation aimed at combating discrimination based on gender.

²⁴ The CFR was solemnly proclaimed on 7 December 2000, but it did not have full legal effect until the entry into force of the Treaty of Lisbon on 1st December 2009. Title III of the Charter is entirely dedicated to gender equality. According to art 23, entitled 'Equality between men and women': 'Equality between men and women must be ensured in all fields, including employment, work and pay. The principle of equality does not preclude the maintenance or adoption of measures that provide specific advantages in favor of the underrepresented sex'. As is evident from the wording of this provision – also strengthened by the more general prohibition of discrimination contained in art 21 – equality between men and women has today become a mainstreaming principle within the European Union, underlying all political choices and every action to be taken. In 2021, the 'Annual Report on the Application of the EU Charter of Fundamental Rights' was specifically devoted to the topic 'Protecting Fundamental Rights in the Digital Age' (10 December 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0819z>>.



European integration process, in the same way, the protection of freedom of expression is considered a bulwark of European democracy.²⁵

The most recent act of political commitment adopted at the EU level is the Strategy entitled ‘A Union of equality: the strategy for gender equality 2020-2025’, adopted in 2020. Among its numerous and worthy objectives, we can find both the fight against gender violence and against sexist stereotypes. Furthermore, online violence against women is not only stigmatized, but expressly recognized as an obstacle to women’s participation in public life: ‘[t]oo many people still violate the principle of gender equality through sexist hate speech and by blocking action against gender-based violence and gender stereotypes’.²⁶

As for secondary law acts, there exists an increasing number of regulations and directives containing rules referring to the right to freedom of expression. In this respect, the most relevant legal instruments are: the Directive on Electronic Commerce,²⁷ the Directive on the Protection of Copyright,²⁸ the Regulation on the Protection of Personal Data,²⁹ the Directive on Audiovisual Media,³⁰ the Regulation concerning Prevention of the Spread of Terrorist Content Online³¹ and the Whistleblowing Directive.³² Indeed, all of them seek to establish the

²⁵ See R Mastroianni, ‘Freedom of pluralism of the media: an European value waiting to be discovered?’ (2022) 1 *MediaLaws* 101 <www.medialaws.eu/wp-content/uploads/2022/02/3-21-Mastroianni.pdf>. See, also, Joined Cases nos C-203/15 and 698/15 *Tele2 Sverige AB v Post- och Telestyrelsen and Secretary of State for Home Department v Tom Watson and Others* [2016] <ECLI:EU:C:2016:970> para 93 affirming that freedom of expression ‘constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded’. See, also, Article 11 CFR: ‘1. Every person has the right to freedom of expression. This right includes freedom of opinion and freedom to receive or communicate information or ideas without interference by public authorities and without frontier limits. 2. Freedom of the media and its pluralism are respected’.

²⁶ European Commission ‘A Union of Equality: Gender Equality Strategy 2020-2025’, COM(2020) 152 final (5 March 2020) 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152>>. The Strategy presents the main objectives and actions aimed at making significant progress by 2025 towards a European Union that can present itself to the World as a guarantor of gender equality.

²⁷ [2000] OJ L 178.

²⁸ [2019] OJ L 130.

²⁹ [2016] OJ L 119.

³⁰ [2018] OJ L 303.

³¹ [2021] OJ L 172.

³² [2019] OJ L 305.



criteria for balancing the rights affected in the specific regulated area with the right to freedom of expression.

With regards to the specific efforts carried out by the EU to stem online hate speech,³³ it has recognized manifestations of hate speech among the limits to freedom of expression and, in this regard, has adopted the *Framework Decision on the fight against certain forms and expressions of racism and xenophobia through criminal law*.³⁴ Another important regulatory instrument is *Directive 2012/29/EU on the rights of crime victims* which aims, among other things, at guaranteeing justice, protection and support for crime victims based on hatred and hate speech.³⁵ In both the acts reported above, however, no reference is made to sexist hate speech, nor is explicit protection provided for certain categories of victims, such as women.³⁶

In 2016 the European Commission launched, together with Facebook, Twitter, YouTube and other large internet companies such as Instagram, Google+, Snapchat, Dailymotion, Jeuxvideo.com and Tik Tok, which have joined the initiative at a later stage, – a *Code of Conduct* including a series of commitments to combat the spread of hate speech on the internet.³⁷ The Code does not seem to be limited to a mere

³³ In the European Commission's opinion, hate speech dissemination in the online world can be regarded as a social emergency eventually leading to relevant individual, political, and social consequences. See European Commission Press Release IP/18/1169, *A Europe That Protects: Commission Reinforces EU Response to Illegal Content Online* (1st March 2018).

³⁴ [2008] OJ L 328. Here Member States are asked to make punishable, among other things, 'public incitement to violence or hatred towards a group of people, or one of its members, defined by reference to race, colour, religion, ancestry, national or ethnic origin' (art 1).

³⁵ [2012] OJ L 315. It requires Member States to ensure that victims of crime are treated in a fair and non-discriminatory manner, paying particular attention to victims of crimes motivated by prejudice or discrimination.

³⁶ On the subject of freedom of expression and protection of human rights, it is worth recalling the adoption of an important act of soft law, namely the 'EU Human Rights Guidelines on Freedom of Expression Online and Offline' (approved on 12 May 2014) <www.eas.europa.eu/sites/default/files/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf>.

³⁷ See <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en> and K Podstawa, 'Hybrid Governance or... Nothing? The EU Code of Conduct on Combating Illegal Hate Speech On-line' in E Carpanelli, N Lazzarini (eds), *Use and Misuse of New Technologies* (Springer 2019) 167.

declaration of intent but provides specific rules requiring companies to introduce clear and effective procedures to examine reports regarding illegal forms of incitement to hatred in the services they offer, to be able to remove such content or disable access. Unfortunately, the EU Code of Conduct's definition of hate speech online does not mention gender, sexism or misogyny as it largely focuses on racism and xenophobia. However, for their part, the involved companies are proving to be punctual and precise in their reporting to the Commission and some of them have demonstrated that tackling gender-based hate speech is among their commitments.³⁸

At the end of 2020, the European Commission proposed a horizontal reform of the European regulation regarding the liability of platforms for the dissemination of illicit content, the so-called. *Digital Services Act*, consisting of a series of rules on the obligations and responsibilities of digital intermediaries within the single market: these, indeed, are graduated according to the size of the operators and the consequent ability to know the contents that are uploaded by users.³⁹

This act belongs to a package of measures aimed at updating EU regulation of the digital sector and its main objective is to regulate

³⁸ See 7th Monitoring round of the Code of Conduct <<https://commission.europa.eu/system/files/2022-12/Information%20provided%20by%20the%20IT%20companies%20about%20measures%20taken%20to%20counter%20hate%20speech%20%E2%80%93%202022.pdf>>.

³⁹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), [2022] OJ L 277. See, also, Y Citino, 'The Digital Services Act at the test bench' (15 November 2023) <www.diritticomparati.it/the-digital-services-act-at-the-test-bench/>; P Church, C Necati Pehlivan, 'The Digital Services Act (DSA): A New Era for Online Harms and Intermediary Liability' (2023) 4 *Global Privacy L Rev* 53; B Duivenvoorde, 'The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act' (2022) 11 *Eur Common Market L Rev* 43; G Frosio, C Geiger, 'Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime' (2023) 29 *Eur Law J* 1; AP Heldt, 'EU Digital Services Act: The White Hope of Intermediary Regulation', in *Digital Platform Regulation* (Springer 2022) 69; M Peguera, 'The Platform Neutrality Conundrum and the Digital Services Act' (2022) 53 *Intl Rev of Intellectual Property and Competition L* 681; B Petkova, T Ojanen (eds), *Fundamental Rights Protection Online, The Future Regulation of Intermediaries* (Edward Elgar 2020); A Turillazzi, F Casolari, M Taddeo, L Floridi, 'The Digital Services Act: an Analysis of its Ethical, Legal, and Social Implications' (12 January 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4007389>.



security, transparency, and access conditions to online services.⁴⁰ Adopted on October 19, 2022, it will be fully enforceable starting from February 17, 2024.

Although carrying out a comprehensive analysis of such innovative Regulation would fall outside the scope of the present paper, it should be stressed its importance. The Regulation establishes new procedures in order to achieve faster removal of illegal content and global protection of the fundamental rights of online users. Its impact in the European digital space will be notable as it is a binding act which has the merit of promoting a rebalancing between the rights and responsibilities of users, intermediation platforms and public authorities and is based on European values, including respect for human rights, freedom, democracy, equality, and the rule of law.

As to online hate speech and its possible ‘sexist connotation’, it could be included in the wider notion of ‘illegal content’ that, according to Article 34(a), must be classified as a ‘systemic risk’ linked to the use of digital services and, thus, diligently identified, analyzed, and assessed by the providers of very large online platforms and of very large online search engines. Furthermore, as a form of gender-based violence, online sexist hate speech could be also included in the notion of ‘any actual or foreseeable negative effects in relation to gender-based violence, [...] and serious negative consequences to the person’s physical and mental well-being’ recalled in the subsequent letter d). Along with this fundamental assessment activity, providers will have an additional duty as to the adoption of *ad hoc* preventive measures to mitigate risks. Article 35, in fact, clearly asks for reasonable, proportionate and effective mitigation measures, tailored to specific systemic risks, that may include, among the others, ‘adapting content moderation processes, including the speed and quality of processing notices related to specific types of illegal content and, where appropriate, the expeditious removal of, or the disabling of access to, the content notified, in particular in respect of illegal hate speech or cyber violence, as well as adapting any relevant decision-making processes and dedicated resources for content moderation’.

⁴⁰ See the initial Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Tackling Illegal Content Online Towards an enhanced responsibility of online platforms’ COM(2017) 555 final (28 September 2017).

Another way followed by the European Commission to fight against hate speech deals with a possible harmonized ‘sanctioning’ approach through the possibility of extending the list of the so-called ‘Euro-crimes’: this option is being discussed within the EU, by leveraging on Article 83(1) TFEU.⁴¹ The conducts currently listed in the Treaty include terrorism, trafficking in human beings and the sexual exploitation of women and minors, illicit drug trafficking, illicit trafficking in weapons, money laundering, corruption, counterfeiting of payment systems, cybercrime, and organized crime.

On 9 December 2021, the Commission published the Communication ‘A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime’, inviting the Council to adopt a decision identifying hate speech and hate crime as another area of crime meeting the criteria set out in Article 83(1) TFEU.⁴² A proposal for such Council decision was annexed to the Communication. If adopted, the Commission may then make a proposal based on Article 83 TFEU for a directive on minimum rules concerning the definition of criminal offences and sanctions in this area of crime. Such directive would be adopted by the Parliament and the Council under the ordinary legislative procedure.

The debate is currently ongoing at the institutional level. At the European Parliament, the proposal has been assigned to the Committee on Civil Liberties, Justice and Home Affairs (LIBE).⁴³ On 4 March 2022,

⁴¹ See ‘Study to support the preparation of the European Commission’s initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime’ (December 2021) <<https://op.europa.eu/en/publication-detail/-/publication/f866de4e-57de-11ec-91ac-01aa75ed71a1/language-en>>.

⁴² See Communication from the Commission to the European Parliament and the Council, ‘A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime’ COM(2021) 777 final (9 December 2021). This interesting proposal was first announced by the President of the European Commission during her State of the Union Address on September 16, 2020, and then formally included in the Commission Work Program 2021. ‘Commission Work Programme 2021: A Union of vitality in a world of fragility’ COM(2020) 690 final (19 October 2020) 7. For an in-depth analysis of this proposal see N Peršak, ‘Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes under Article 83(1) TFEU’ (2022) 33 *Crim L Forum* 85.

⁴³ The Committee on Women’s Rights and Gender Equality (FEMM) was designated as committee for opinion. On 25 October 2023, the FEMM Committee adopted an opinion with a number of suggestions to be incorporated by the LIBE Committee in its



the Council examined the proposal, and a very broad majority was in favour of this initiative. However, since then, the file has stalled at the Council, which has not reached unanimity required to adopt a decision extending the list of crimes.⁴⁴

The draft report on the proposal was presented to the Parliament on 28 June 2023. The report complained the lack of progress on the file in the Council, urging it to adopt the decision so that the Commission can initiate the second stage of the procedure.⁴⁵ The LIBE Committee endorsed the draft report on 13 November 2023.⁴⁶ The report, as amended, among other things, calls on the Commission and the Member States to act against misuses of the internet and social media, thus emphasizing the attention devoted to ICT-facilitated risks.⁴⁷

Aside from the regulatory developments already mentioned that are in the pipeline, the fight against online sexist hate speech has already been explicitly included in the recent *Proposal for a Directive of the European Parliament and of the Council on the Fight against Violence against Women and Domestic Violence*.⁴⁸ With no doubt, the Proposal can be

motion for the resolution. See European Parliament, Opinion of the FEMM Committee for the LIBE Committee on Civil Liberties, Justice and Home Affairs on extending the list of EU crimes to hate speech and hate crime (2023/2068(INI)) (25 October 2023).

⁴⁴ See <www.consilium.europa.eu/en/meetings/jha/2022/03/03-04/>. Instead, on 18 May 2022, the European Economic and Social Committee had adopted an opinion on the subject and so did the European Committee of the Regions on 30 November 2022.

⁴⁵ Deploring the fact that art 83 TFEU requires unanimity in the Council, the Parliament called for the ‘passerelle clause’ to be activated.

⁴⁶ See <www.europarl.europa.eu/news/en/press-room/20231110IPR10115/meps-call-on-council-to-designate-hate-speech-hate-crime-as-crimes-under-eu-law>.

⁴⁷ See <www.europarl.europa.eu/doceo/document/A-9-2023-0377_EN.html>. In the annexed Motion for a European Parliament Resolution on extending the list of EU crimes to hate speech and hate crime, the need to tackle also the online dimension of this crimes is well underlined.

⁴⁸ See European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Combating Violence against Women and Domestic Violence’, COM(2022) 105 final (8 March 2022). See, also, S De Vido, ‘A First Insight into the EU Proposal for a Directive on Countering Violence against Women and Domestic Violence’, in EJIL:Talk! (April 7, 2022) <www.ejiltalk.org/a-first-insight-into-the-eu-proposal-for-a-directive-on-countering-violence-against-women-and-domestic-violence/>. The Commission’s starting point is that online violence unfortunately particularly affects women involved in public life, ie] in politics, journalism and even in the defence of human rights. The distorted effects of this hateful phenomenon lead to hindering their participation in social life, thus undermining the very value of democracy also enshrined in art 2 TEU and on which, pursuant to art 10 TEU, the European Union is founded.



regarded as a stepping stone in building the elements that make up the legal framework for combating online sexist hate speech. It is extremely important, in fact, that it specifies the circumstance whereby it ‘also takes into account recent phenomena not specifically addressed by the Istanbul Convention such as online violence against women’.⁴⁹

As to the main relevant aspects of the Proposal, it must be stressed that the Preamble states that it is ‘necessary to provide harmonized definitions of crimes and penalties inherent to certain forms of online violence. (...) Online violence affects women and girls to an uncommon extent (...)’ (para 17). Furthermore, it is worth noting that Article 10 is then specifically devoted to online hate speech, according to which ‘Member States shall ensure that the intentional conduct of inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex or gender, by disseminating to the public material containing such incitement by means of information and communication technologies is punishable as a criminal offence’: online sexist hate speech is, thus, among those conducts that Member States are asked to criminalize and make prosecutable.

Along with this criminal law approach, in the Proposal the Commission has also emphasized the central role that preventive policies can play. As a matter of fact, without prevention, even the harshest repressive measures can do little to eradicate this hateful phenomenon, which is at odds with the inner dignity of every woman. In this regard, Article 36 deals with those measures that shall aim ‘to counter harmful gender stereotypes, to promote equality between women and men and to encourage everyone, including men and boys, to act as positive role models to facilitate behavioral changes throughout society (...)’ 7. Preventive measures also specifically address online violence’.

Finally, we must recall the importance of the role played by the European Institute for Gender Equality in promoting a legal and social culture

⁴⁹ As already mentioned, this represented a main ‘gap’ in the Council of Europe Convention, partly filled by the GREVIO recommendation. The Commission, however, is fully aware that with the use of the internet and IT tools, online violence continues to increase and often acts as a corollary or precedes the violence suffered by victims in ‘real life’.

that deplors online sexist hate speech at the EU level.⁵⁰ Recently, for instance, it has embraced and proposed a shared definition of what should be considered online sexist hate speech. Accordingly, '[o]nline gender-based hate speech is defined as content posted and shared through ICT means that: a) is hateful towards women and/or girls because of their gender, or because of a combination of gender and other factors (e.g. race, age, disability, sexuality, ethnicity, nationality, religion or profession); and/or b) spreads, incites, promotes or justifies hatred based on gender, or because of a combination of gender and other factors (e.g. race, age, disability, sexuality, ethnicity, nationality, religion or profession). It can also involve posting and sharing, through ICT means, violent content that consists of portraying women and girls as sexual objects or targets of violence. This content can be sent privately or publicly and is often targeted at women in public-facing roles'.⁵¹

5. *Concluding remarks*

Especially in recent years – also due to the Covid-19 pandemic which has pushed us towards a massive and indiscriminate use of new technologies and towards an immersion in the virtual world for most of our days – the increasing use of the internet and various social media has led to a dramatic surge in cases of public incitement to violence and hatred, including those based on sex or gender. Unfortunately, the disinhibiting effect of the internet, amplified by the anonymity that it can guarantee, has facilitated the multiplication of episodes of rapid and large-scale – often global – sharing of hate speech in the digital world.

Women are often the targets of sexist and misogynistic hatred online, which can, in some cases, also degenerate into hate crimes in the real world.⁵² The ultimate and extreme consequence of those attacks is that women victims give up the digital space.

⁵⁰ See, for instance, EIGE, 'Combating Cyber Violence against Women and Girls', (25 November 2022) <<https://eige.europa.eu/publications-resources/publications/combating-cyber-violence-against-women-and-girls>>.

⁵¹ See EIGE, 'Cyber Violence against Women and Girls. Key Terms and Concepts' (n 4) 6.

⁵² Unfortunately, ICT means can contribute to make online forms of sexist hate speech more harmful, because it is significantly more difficult to permanently remove abusive or

As to the existing definitions of CVAWG in European Union's Member States, they tend to vary significantly and, most of the times, they do not take into account the continuum of violence between the physical and digital space. Furthermore, they tend to be gender neutral and neglect the intersectional patterns of vulnerability and risk for specific groups of women and girls.⁵³

Against such a complex background, the above-mentioned recent developments within the European context – especially the adoption of the *Digital Services Act*, the presentation of the *Proposal for a Directive on the fight against violence against women* and the Commission's initiative to expand the list of 'Euro-crimes' – clearly demonstrate a general tendency towards the promotion of a safer and more inclusive 'digital ecosystem' for women. Furthermore, on 29 November 2023, the Fundamental Rights Agency has adopted a crucial report dealing with online content moderation to detect hate speech, including the sexist one⁵⁴. This document could be certainly evaluated as another important step in the path towards the eradication of this phenomenon from the European digital space.

This said, one should finally observe that, more than ever, in a playing field involving complex relationships among multiple stakeholders, States are certainly called upon to assume responsibility for the fight against online sexist hate speech. However, at the same time, it emerges that new important obligations are also being consolidated for platforms' managers and intermediaries: it is now time to deepen a cross-sector partnerships approach in order to effectively curb online sexist hate speech and all the other manifestations of digital gender-based violence against women and girls.

triggering content from the Internet, which often results in re-victimization. See Gender and Policy Insights, 'When Technology Meets Misogyny: Multi-level, intersectional solutions to digital gender-based violence' (2019) <<https://gen-pol.org/wp-content/uploads/2019/11/When-Technology-Meets-Misogyny-GenPol-Policy-Paper-2.pdf>>.

⁵³ As to online hate speech, it is worth noting that the gendered nature of the offence is recognised in only nine Member States (EE, EL, ES, LV, LT, HU, MT, AT, PT). See EIGE, 'Combating Cyber Violence against Women and Girls' (n 50) 34.

⁵⁴ FRA, Online content moderation – Current challenges in detecting hate speech (29 November 2023) <<https://fra.europa.eu/en/publication/2023/online-content-moderation>>.

