



5. From now on, each Member State — and beyond — will be able to easily follow the French example and hide behind any “national security” claim to disregard its international obligations and the rule of law.”

Guideline 29: Reflect on why you are approaching a particular forum. Assess the strengths, weaknesses, and strategic opportunities various alternative fora may provide.

Public versus private actors in litigation

The role of big tech in the context of digital rights remains a key concern:

“Despite some notable progress, most of the world’s biggest internet, mobile, and telecommunications companies are still failing to predict and mitigate the human rights harms of their business decisions, design choices, and deployment of new technologies.” ⁶⁴

When assessing different legal routes, consideration should be given to effective ways to hold both state and non-state actors to account. Accordingly, assessing the value of various fora may come down to who the defendants are. There are likely to be different considerations for state and non-state actors. Knowing who to litigate against, and what the various obstacles and opportunities are, may be determinative in your litigation strategy. Traditionally, the primary target of strategic litigation has been governments. However, companies are increasingly entering the fray. Litigating against the private sector can be

⁶⁴ Business & Human Rights, ‘Ranking Digital Rights 2019 index finds tech companies ‘still failing’ to curb abuse on privacy and free expression’ (2019) (accessible at <https://www.business-humanrights.org/en/blog/ranking-digital-rights-2019-index-finds-tech-companies-still-failing-to-curb-abuse-on-privacy-and-free-expression/>).