

# ***CRA International Competition Workshop***

## ***Panel 2: Art. 82 in the Energy Sector***




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# Relationship between Art. 82 and Regulation

- CFI in „Deutsche Telekom“ (2008)

*„Decisions by national regulation authorities do not affect the Commission’s power to find infringements of competition law“*

	Regulation	Art. 82
natural monopolies / grids		double scrutiny?
upstream and downstream activities	 if liberalized	

## Relationship between Art. 82 and Regulation (2)

- **Challenges and risks for the industry, in particular in grid sector**

### **Ex ante self-assessment in view of:**

- **Retrospective change of competition authorities' focus and assessment?**
- **Uncertainty as regards the extent to which different authorities adhere to common principles**
- **Impacts of regulatory improvements on previous conduct?**
- ➔ **Competition authorities should consider need for lead time to achieve implementation and acceptance of new regulatory rules**

# Relationship between Art. 82 and Regulation (3)

- **Practical issues of Art. 82 proceedings**
  - **Tying-up of resources**
  - **Fines under Art. 81 and Art. 82**
    - **Deficiencies in European competition law?**
  - **Art. 9 commitments**
    - **Structural changes vs.  
reliable precedents on compliant market behaviour**

# Art. 82 vs. National Provisions on Dominance

- **National rules may be stricter than Art. 82 (Art. 3 sec. 2 Reg. 1/2003)**
  - **High uncertainty for industry, in particular with respect to pricing (§ 29 GWB)**
  
- **Diverging application of Art. 82 by EU COM and national authorities**
  - **CO<sub>2</sub>-Saga: Was inclusion of prices of free CO<sub>2</sub>-certificates in electricity wholesale prices an abuse of a dominant position?**

## Conclusions (1)

- **Art. 82 seems to be not best suitable to provide timely and efficient precedents in the context of dynamic and developing regulatory regimes**
  
- **Fining practice under Art. 81 and Art. 82**
  - **Deficiencies in European competition law?**
  
  - **In particular questionable for regulated sectors**

## Conclusions (2)

- **Art. 82 appropriate in upstream and downstream sectors**
- **Full effectiveness of Art. 82 requires**
  - **Identical standards in Member State laws**
  - **Homogeneous application by EU COM and national authorities**