



The European Federation of Financial Services Users  
Fédération Européenne des Usagers des Services Financiers



# VW Update

Better Finance General Assembly  
Paris, 14th December 2015

Jella Benner-Heinacher  
Vice-President Better Finance

# The VW Case

## Facts (as of November 30, 2015)

- US-American authorities revealed that certain cars from Volkswagen AG violated US emission standards through the use of so-called defeat devices.
- Volkswagen subsequently acknowledged having installed such defeat devices in 11 million diesel vehicles to reduce the effectiveness of the US authorities' emission control systems under testing conditions.
- Following the revelation of these offenses, the price of Volkswagen securities declined significantly.
- Further violations are revealed almost daily.
- Volkswagen may be liable for damages suffered resulting from the obligation under the German Securities Trading Act (WpHG) to disclose without undue delay market price relevant information.

# The VW Case

## Important Key Dates (1)

August 2008: Volkswagen introduces the VW Jetta 2.0 TDI model with engine type EA 189 to the US market. A software for this type of engine (defeat device), which is used since 2007, recognizes a test pattern and can adopt the car's emissions under testing conditions.

The respective software had been developed by Bosch. Bosch apparently already in 2007 made clear to Volkswagen that the software would not be legal for production vehicles.

End of 2011: A Volkswagen engineer apparently informs a member of of a Volkswagen subsidiary about the use of defeat devices. It is unclear if or when this information reached the Volkswagen Group Management Board.

# The VW Case

## Important Key Dates (2)

May 2014: Results from a study of West Virginia University (WVU) published on May 15, 2014 find that nitrogen oxide (NOx) emissions from two Volkswagen diesel engines exceeded US standards by a factor of up to 35 under typical driving conditions. Under ordinary testing conditions, the results remained inconspicuous.

WVU notifies the Environmental Protection Agency (EPA) and California Air Resources Board (CARB) and apparently also Volkswagen about their findings. EPA and CARB start own investigations that confirm the WVU findings.

US Authorities inform VW in mid-2014 about their findings.

July 2015: EPA and CARB announce to Volkswagen that they will not approve certificates of 2016 model year diesel vehicles if the company would not ensure that emission limits are not exceeded.

# The VW Case

## Important Key Dates (3)

August 19, 2015: Volkswagen allegedly partially confesses to CARB certain wrongdoings.

September 3, 2015: Volkswagen admits the software manipulation vis-à-vis the US authorities.

September 8, 2015: EPA and CARB issue a notice of violation of the US Clean Air Act and inform the public that certain Volkswagen diesel vehicles include manipulated software that circumvents EPA emissions standards.

September 20, 2015: Volkswagen CEO Martin Winterkorn issues a public statement in which he declares that he “takes these findings very seriously”.

# The VW Case

## Important Key Dates (4)

September 22, 2015: Volkswagen issues an ad-hoc announcement and states that “[...] the relevant engine management software is also installed in other Volkswagen Group vehicles with diesel engines. [...] Discrepancies relate to vehicles with Type EA 189 engines, involving some eleven million vehicles worldwide.”

September 23, 2015: Volkswagen CEO Martin Winterkorn resigns, Matthias Müller succeeds him.

November 3, 2015: Volkswagen reports the manipulation of CO2 levels of around 800,000 Volkswagen Group vehicles and estimates the follow-up costs at approximately 2 billion EUR.

# The VW Case

## Share Price Development (1)



(27.08.2015-27.11.2015)

# The VW Case

## Share Price Development (2)



(02.05.2014-27.11.2015)



# The Legal Aspects

## KapMuG – What is it?

- The Capital Markets Model Case Act (KapMuG) which was originally in force since 2005 has been fundamentally reformed in 2012, with its revised form in force since 01.11.2012
- Goals pursued by the legislator via KapMuG:
  - Compliance with capital market regulations shall be enforced through a powerful collective instrument
  - Improvement of individual legal protection
  - Reduction of individual cost risk by bundling rectified claims
  - Reduction of the risk of divergent decisions
  - Relief of the courts
  - Strengthening of Germany relating to capital market related disputes
- Until now however, no individual proceedings have been resumed after a binding model case ruling by the Higher Regional Court. Therefore, the suitability of the model case proceedings can not yet be conclusively assessed.

# The Legal Aspects

## What is new in the reformed KapMuG? (1)

- Introduction of the regulation regarding the **registration of a claim** (so-called “Anspruchsanmeldung”) for suspension of limitation:

“The limitation period is suspended by the service of the registration for a test case for claims designated therein, where they are based on the same circumstances as the determinations applied for in the test case, and if the action for performance or for a declaration of the existence of the claims designated in the registration is lodged within three months of the final termination of the test case” (§ 204 I Nr. 6a BGB)

Investors who do not want to file an individual claim can join the proceedings indirectly by simply registering their claim and applying for model case treatment.

**Benefits:** Lower costs, suspension of limitation period

**Drawbacks:** No direct influence on claim proceedings

## The Legal Aspects

### What is new in the reformed KapMuG? (2)

- Moderate expansion of the scope: No distinction between direct or indirect significance of public capital market information for the claim
- Possibility of conclusion of a litigation settlement in order to terminate the model case proceedings
- Regulations for accelerating the model case proceedings
- Expansion of the non-contestability of decisions under KapMuG:
  - Public announcement of admissible application for model case proceedings in the the Complaint Registry (§ 3 II KapMuG)
  - Decision on the model case plaintiff (“Musterkläger-Bestellungsbeschluss”, § 9 II 2 KapMuG)

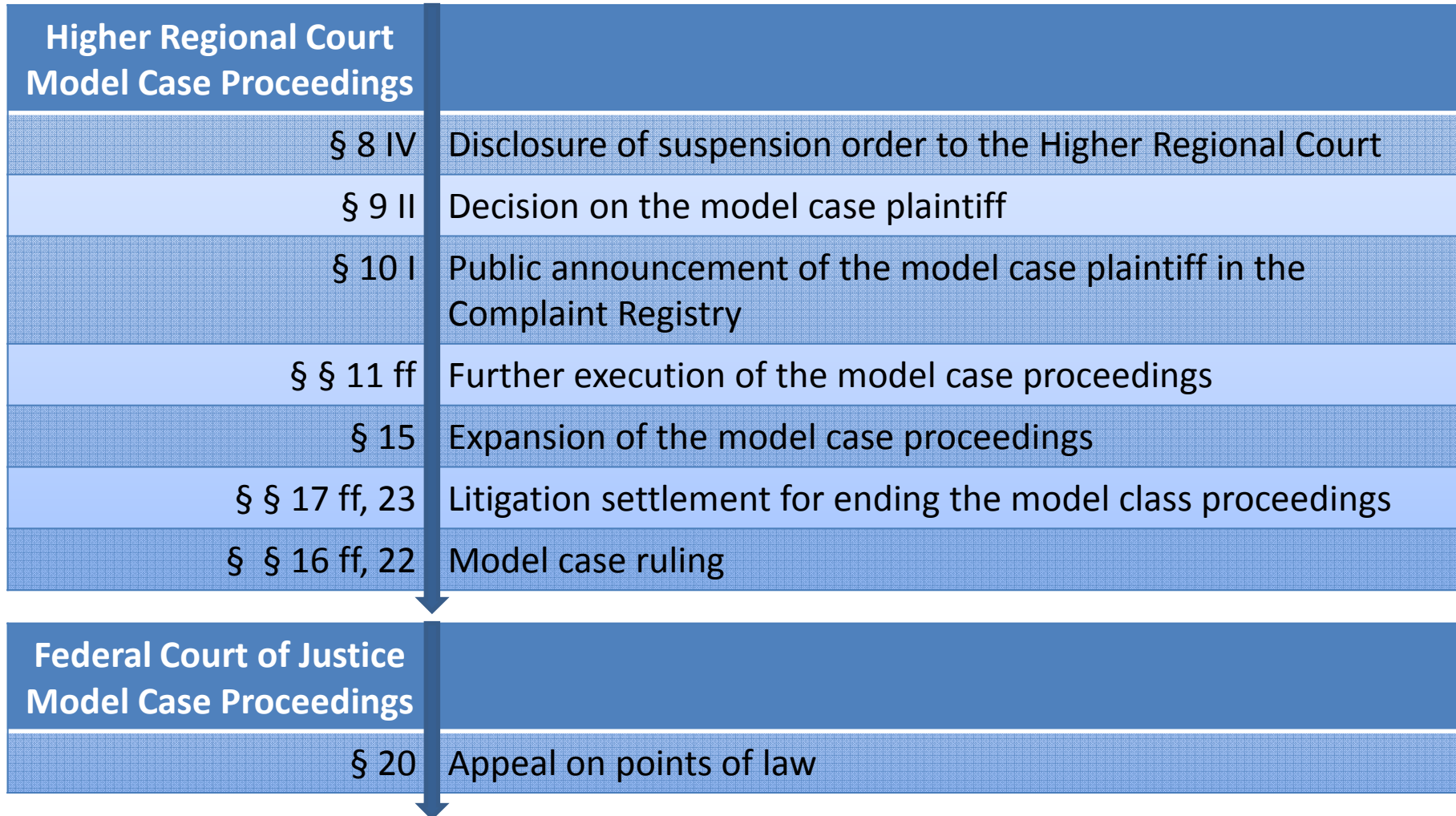
# The Legal Aspects

## KapMuG proceedings visualised (1)

District Court Main Proceedings	
§ 1	First-instance proceedings, individual litigation
§ 2	Application for establishment of a model case
§ 3 II	Public announcement of application for establishment of a model case in the Complaint Registry
§ 5	Interruption of proceedings upon public announcement
§ 6 I	9 further related applications for establishment of a model case within 6 months after the first public announcement
§ 6	Reference to the Higher Regional Court
§ 6 IV	Announcement of reference to the Higher Regional Court in the Complaint Registry
§ 8	Suspension order

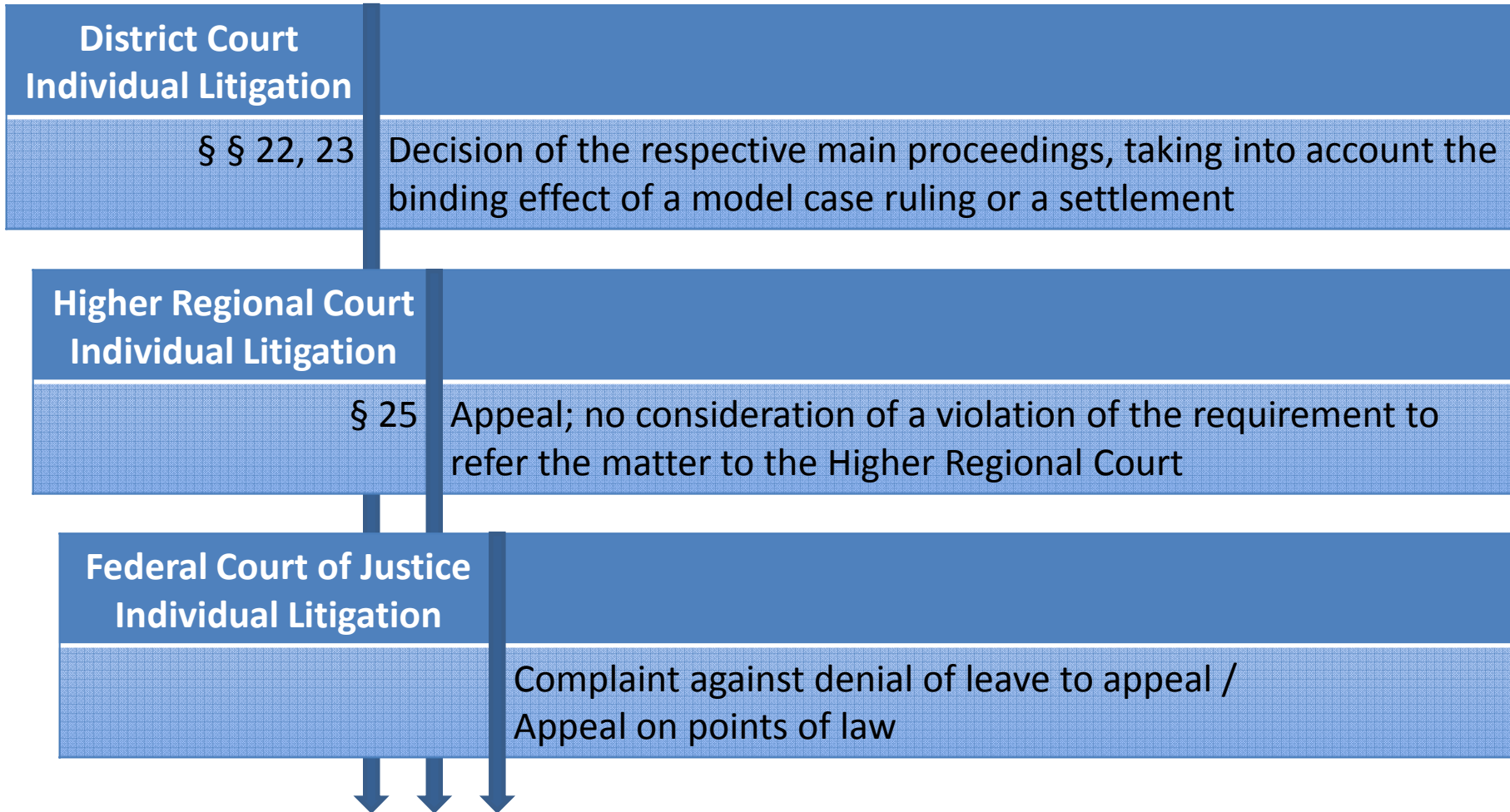
# The Legal Aspects

## KapMuG proceedings visualised (2)



# The Legal Aspects

## KapMuG proceedings visualised (3)



## The Legal Aspects

### Requirements for potential claims in Germany (1)

*Why may Volkswagen potentially be liable for damages?*

Volkswagen has **potentially** not complied with the obligation of companies listed on a stock exchange in Germany to disclose without undue delay market price relevant information, resulting from the German Securities Trading Act (WpHG).

This relates in particular to a possible obligation by Volkswagen to publish information on the use of defeat devices in diesel vehicles.

*Owners of what type of Volkswagen securities can claim compensation?*

Beside owners of Volkswagen's **ordinary and preference shares**, owners of any other security issued by Volkswagen, e.g. **derivatives** like **warrants/certificates** or **corporate/hybrid bonds** are potentially eligible to claim compensation if they have suffered losses.

## The Legal Aspects

### Requirements for potential claims in Germany (2)

*How can owners of Volkswagen securities claim compensation?*

**Irrespective of the place of residence or purchase**, compensation can be claimed at a German court. In principle each claim has to be pursued individually, as no general collective redress mechanism exists in Germany. However, in case of disputes under capital markets law, claims can be brought to court by way of a model claim in line with the Capital Markets Model Case Act (KapMuG).

*Which time frame is decisive for the purchase of the respective securities?*

This may not be answered conclusively at this stage, as it is **unclear at what point in time** Volkswagen would have been obliged to publish information on the use of defeat devices in diesel vehicles.



# The Legal Aspects

## Requirements for potential claims in Germany (3)

*What is the amount that can be claimed as compensation?*

Depends on the type of compensation that is to be claimed:

- Damage resulting from acquisition (so-called “Erwerbsschaden”)
  - If shares are sold: Purchase price less sales price
  - If shares are still held: Restitution of purchase price concurrently against return of shares
  
- Abstract damage (so-called “Kursdifferenzschaden”)
  - Hypothetical share price development, i.e. the development in case the ad-hoc-announcement of Volkswagen would have been made in good time, is of relevance
  - Here: Development of the share price between the publication of the manipulation (September 18, 2015) and the ad-hoc disclosure of Volkswagen (September 22, 2015)
    - Volkswagen ordinary shares: 56.20 EUR/share (Xetra)
    - Volkswagen preference shares: 61.80 EUR/share (Xetra)
  - To claim abstract damage it is necessary that the securities had been held in deposit at the time of the publication of the software manipulation

# The Legal Aspects

## Potential compensation claims summarised

	Probability of compensation claims according to current DSW assessment	Amount of compensation – purchase via Xetra			
		VW ordinary share		VW preference shares	
		Abstract damage*	Acquisition damage**	Abstract damage*	Acquisition damage**
<b>until 2008</b>	rather low	56.20 EUR/share	Purchase price less sales price. If shares are still held: Restitution of purchase price concurrently against return of shares.	61.80 EUR/share	Purchase price less sales price. If shares are still held: Restitution of purchase price concurrently against return of shares.
<b>until 2011</b>	rather low	56.20 EUR/share	"	61.80 EUR/share	"
<b>until 14.5.2014</b>	rather low	56.20 EUR/share	"	61.80 EUR/share	"
<b>15.5.2015 to 2.9.2015</b>	high	56.20 EUR/share	"	61.80 EUR/share	"
<b>since 3.9.2015</b>	very high	56.20 EUR/share	"	61.80 EUR/share	"

\* Current assessment based on the share price development between September 17, 2015 (closing price) and September 22, 2015 (closing price)

\*\* Purchase price must be higher than 111.20 EUR/ordinary share and 106.00 EUR/preference share, respectively, as otherwise no loss has been incurred

## The DSW Offer

- Information service (free of charge for all Volkswagen investors)
- Registration and initial assessment of potential compensation claims (free of charge for DSW members)
- Q&A document and registration form (circulated end of October 2015)
- In case the claims against Volkswagen become more concrete and can be evidenced, DSW will support Volkswagen investors to enforce such claims as cost-efficient as possible

## Alternatives (1)

- DSW's view on litigation in Germany:
  - High chance to receive compensation based on German law for certain Volkswagen investors
  - Only serious possibility for any VW shareholder regardless of place of residence or purchase to claim compensation
- The legal environment in Germany:  
The race started: A playing field for German & US lawyers and litigation funding firms (Reiter, Tilp, Kälberer, Deminor, Bentham etc.)

## Alternatives (2)

- Alternate possibility to enter **settlement** proceedings or to participate in such proceedings in The Netherlands:
  - DSW currently investigating the necessary preconditions with respect to different already existing foundations, such as:  
VEB, ConsumentenClaim, Reus, Labaton (WFI) etc. (more expected to come)
  - No time pressure: Limitation period for such legal actions expires after five years
- Final objective for VW shareholders:  
Find the best and most efficient foundation which has the lowest costs/fees and the best chances to settle with VW
- US: Different class actions by car owners, ADR holders, bondholders (Robbins & Co, Goldberg, Motley Rice etc.)

# The Dutch Collective Claim

## The Dutch Act on Collective Settlement of Mass Damages

- Became effective on July 27, 2005
- Intends to facilitate the class settlement of claims for “mass damages”
- Permits the parties to a **class settlement agreement** to request that the Amsterdam Court of Appeals declare the class settlement binding upon a class or classes of persons the members of which suffered similar damages
- Application in two cases (Shell (2009) and Converium (2012)) with international dimensions makes this instrument potentially relevant to settle mass claims in which the vast majority of potential plaintiffs / beneficiaries is based outside of The Netherlands

# The Dutch Collective Claim

## Outline of Proceedings under the Dutch Act

### Four Phases:

- (1) Conclusion of the Settlement Agreement
- (2) Proceedings before the Amsterdam Court of Appeals
- (3) Opt-Out Period for the Beneficiaries
- (4) Payment to the Beneficiaries

# The Dutch Collective Claim

## (1) Conclusion of the Settlement Agreement

- Settlement Agreement must be concluded between:
  - i. the parties that will pay the compensation for the event that has caused damage
  - ii. a **Dutch foundation or association** that, pursuant to its constituent documents, represents the interests of the class of persons intended to be covered by the settlement agreement
- Dutch legal entity can be created solely to qualify for the proceedings, is not appointed by a court, but should make clear (through concrete actions) that it represents the class sufficiently
- Proceeding under the Dutch Act could start with a private, non-court-supervised and undisclosed negotiation process among the representatives of the interest parties
- “Damage Scheduling Approach”: Compensation is awarded on the basis of characteristics of the group of which individual plaintiffs are (deemed) members of, based on several factors



# The Dutch Collective Claim

## (2) Proceedings before the Amsterdam Court

- Amsterdam Court's involvement begins when settlement agreement has been concluded and parties request to declare it binding upon the class of persons it intends to cover, parties initiating the proceeding must notify the intended beneficiaries
- Amsterdam Court subsequently calls a hearing: Intended beneficiaries and other "interested parties" may express their objections to the settlement
- Amsterdam Court will declare the settlement agreement binding upon the parties thereto and the members of the class, except if, for instance, the amount of compensation is deemed unreasonable

# The Dutch Collective Claim

## (3) Opt-Out Period for the Beneficiaries

- After settlement agreement is declared binding, the settlement's final terms and conditions must be published
- Members of the class have at least one year after such publication to file the claim form pursuant to which they will receive compensation
- Additionally, a period of at least three months commences during which members of the class may elect to opt out of the settlement
- Usually, the defendant has the right to terminate the settlement agreement if a group of shareholders who could claim for a set percentage (e.g. 5%) of the total amount available under the settlement agreement opts out in a timely manner

=> Subsequently: **(4) Payment to the Beneficiaries**

## Concluding Remarks

- DSW is in ongoing discussions with all relevant actors and continues to gather information and keep affected Volkswagen shareholders up to date
- There is currently no time pressure as the deadline for potential compensation claims will expire not before spring 2016 – assuming the shortest potential deadline
- DSW therefore explicitly advises against entering legal actions at this point in time
- DSW will assess the best and cost-efficient alternative for Volkswagen shareholders in light of the probability of success of legal proceedings
- Possible next steps will be undertaken in close collaboration with Better Finance and its member organisations