

Frequently asked questions on “open pools” under Article 7 of Regulation (EC) No 443/2009 (CO₂ from cars) and Regulation (EU) No 510/2011 (CO₂ from vans)

May 2018

Article 7 of Regulation (EC) No 443/2009 (CO₂ from cars) and Regulation (EU) No 510/2011 (CO₂ from vans) foresee that manufacturers may under certain conditions form a “pool” for the purposes of meeting their specific emissions target. Article 7(5) requires pools where not all manufacturers included in the pool are part of the same group of connected manufacturers - i.e. so-called “open pools” to allow for “open, transparent and non-discriminatory participation on commercially reasonable terms by any manufacturer requesting membership of the pool” and to be in compliance with Articles 101 and 102 TFEU¹. It is for manufacturers to ensure that those conditions are fulfilled with regard to the formation of any open pool.

This document provides answers to general questions in relation to the formation of “open pools”. It sets out how to ensure open, transparent and non-discriminatory participation on commercially reasonable terms. This document complements the document “Frequently asked questions on application for pooling pursuant to Article 7 of Regulation (EC) 443/2009”².

It is for each “open pool” to assess the compatibility with EU competition rules. Compliance with Article 7(2) and 7(5) of Regulation (EC) No 443/2009 and Regulation (EU) No 510/2011 and compliance with Articles 101 and 102 TFEU are not necessarily related, i.e. a pool can be in compliance with Article 7(2) and 7(5) but in non-compliance with Articles 101 and 102 TFEU.

The European Commission, National Competition Authorities and national courts are all empowered to apply EU competition rules.

For more information and guidance on EU competition law, as well as relevant contact points (including for National Competition Authorities), please refer to the Directorate General for Competition’s website at: http://ec.europa.eu/comm/competition/index_en.html

Open, transparent and non-discriminatory participation

- 1. Do “open pools” (or the intention to form an “open pool”) need to be published before the deadline of 31 December in order to provide other manufacturers with the opportunity to join the pool?**

In order to comply with the conditions set out in Article 7(5), the agreement to form an “open pool” or the intention to do so should be published within a certain time period before 31 December of the year for which the pool shall apply. It is therefore recommended to notify the Commission of any open pooling declarations or declarations of intent at the latest by **31 October** in the calendar year for which emissions are to be pooled. The Commission will publish these declarations on CIRCABC³ to allow third parties to express their interest in joining a pool to the pool manager. It is for the

¹ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 respectively of the TFEU. The two sets of provisions are in substance identical.

² <https://circabc.europa.eu/w/browse/3c090b5c-c2c5-4a7f-a04f-16e665532ecd>

³ <https://circabc.europa.eu/w/browse/3c090b5c-c2c5-4a7f-a04f-16e665532ecd>

manufacturers to ensure that all necessary documents are submitted to the Commission by the deadline of **31 December**.

2. Are the CO₂ monitoring data reported by Member States and the calculations for each manufacturer publicly available?

Yes. The provisional and final CO₂ monitoring data for each manufacturer are published annually at the latest by 30 June and 31 October respectively for the previous calendar year. The data are available under the following hyperlinks:

- Cars: https://www.eea.europa.eu/ds_resolveuid/DAT-116-en
- Vans: https://www.eea.europa.eu/ds_resolveuid/VFDG2NXPM1

The final CO₂ performance calculations for each manufacturer and pool are published annually by 31 October in the Official Journal of the European Union.

3. Can a manufacturer create an “open pool” alone (inviting others to join later) or does a manufacturer have to join with another manufacturer first?

It is not possible to create a pool alone. Article 7(1) stipulates that “manufacturers” may form a pool. A manufacturer that wishes to form an “open pool” may request the Commission to publish its interest in forming an “open pool” on CIRCABC and invite other manufacturers to join that pool (see also Question 1).

4. Can a manufacturer join several pools at the same time?

No. A manufacturer can only be member of one pool in a given calendar year. All new registrations of a manufacturer that is member of a pool will be taken into account for the calculation of the pool’s CO₂ emission performance in that year in accordance with Article 7(7).

5. How flexible is membership of an “open pool”?

Once a pooling declaration is filed with the Commission, all members of the pool are committed to the pool for the duration of the pool as specified in the pooling declaration. If a manufacturer decides to leave an “open pool”, all manufacturers included in the pool shall jointly inform the Commission thereof. The change will take effect as from the calendar year in which the Commission is informed. No reason for the change needs to be specified. If a new manufacturer wants to join an existing pool and is accepted by all members of the pool, its membership will be effective as from the registration year in which it joined the pool. If an “open pool” is dissolved and the Commission is informed thereof by the pool manager and all pool members, the change will take effect for new registrations in that year. A commercial agreement among the pool members may limit the risk of unexpected dissolution and therefore provide for better planning certainty.

6. In case a “closed pool” changes to an “open pool” is such change valid for the year of notification or only in the year following the notification?

In case a manufacturer who is not part of the same group of connected undertakings who have formed a "closed pool" enters that pool, the pool becomes an "open pool". As described above, changes to an existing pool or the creation of a new pool will be valid from the registration year in which such change takes place. Therefore, if such a change is filed with the Commission in calendar year X, the modified pool will be applicable to new registrations in calendar year X.

7. Can an "open pool" be limited to one year only in order to minimize compliance risk for the pool members?

In accordance with Article 7(2) an agreement to form a pool may relate to one or more calendar years, provided that the overall duration of each agreement does not exceed five calendar years. Therefore, an open pool can be limited to one year only and it can be renewed every year. In any case, a pooling agreement must be entered into on or before 31 December in the first calendar year for which emissions are to be pooled.

8. If a pool over-complies with its specific emissions target in a given year, can it use credits for subsequent compliance years?

No. Pooling is different from banking of credits. Every year's compliance assessment is independent from the performance in previous years.

9. Can membership of an "open pool" be limited to certain pool members?

This would only be possible in duly justified cases, as described below (see Question 10).

10. Under which circumstances/conditions can the entry of a new manufacturer into an "open pool" be denied?

A manufacturer that wants to join an open pool may be requested by the pool manager and members of the pool to provide information on its average specific emissions, its specific emissions targets and the total number of vehicles registered in the EU, including a forecast for the pooling year(s), as well as evidence of its ability to contribute to the payment of any excess emissions premiums. Where the pool manager finds that the entry of the manufacturer in the open pool would lead to the pool exceeding its specific emissions target, or that there would be a serious risk that this may happen, or if the evidence provided of the new entrant's ability to cover any excess emissions premiums that would arise due to its joining the pool is insufficient, the pool manager may in agreement with the other pool members deny the entry of the manufacturer⁴.

11. What checks should be carried out by the pool manager and the members of a pool in order to ensure that the necessary conditions are met when refusing a third party to join an "open pool"?

It is for the pool manager and members to ensure that an "application" by a third party to join an "open pool" has been considered and assessed in compliance with the conditions set out in Article 7(5). The pool manager should keep records of the

⁴ This is without prejudice to the application of EU competition law.

assessment carried out and should on request provide the detailed reason(s) for which membership of the pool was declined⁵.

In order to enable the Commission to assess whether the conditions for open, transparent and non-discriminatory participation are fulfilled by an “open pool”, the following information must be submitted to the Commission as part of the standard declaration for an “open pool”:

- **Evidence that the “open pool” (or the intention to form an “open pool”) was published by 31 October of the year to which the pool shall apply (including contact details of the pool manager);**
- **In case the participation of one or several third parties to the open pool was denied, the justification for that refusal and evidence that the application had been assessed in a non-discriminatory way.**

Commercially reasonable terms

12. Are there any specific conditions for a commercial agreement between members of an “open pool”?

A priori the Commission will not assess the commercial agreement when a pooling declaration is filed with the Commission since this agreement includes commercially sensitive information. It is for the parties involved to ensure that commercial agreements comply with competition law.

⁵ This is without prejudice to the application of EU competition law.