



**Ofcom consultation on ‘Supplementary guidance on assessment of the VULA margin’
 (“the Consultation”)**

1. In its March 2015 Statement on the VULA margin test, Ofcom indicated that it may revisit its guidance on its treatment of relevant costs and revenues in the test in the event of a “material change in circumstances”¹.
2. BT recently announced significant changes to its BT Sport proposition, and associated retail offerings, both of which are associated with the forthcoming commencement of broadcasting of football matches licensed from UEFA. Ofcom has indicated that it considers these changes to comprise a material change in circumstances.²
3. Ofcom’s Consultation focuses on the treatment of the costs of UEFA football rights acquired by BT in the VULA margin test. Sky does not have comments on the approach proposed by Ofcom in relation to the period over which those costs are included in the VULA margin test.
4. In its March 2015 Statement, however, Ofcom also stated:

*“Our proposal to use the net costs of BT Sport [in the VULA margin test] assumes that BT continues to supply these channels in a similar fashion to the way it does at present. If BT were to make a material change to the way it distributes its channels, we may need to reconsider our approach.”*³
5. Accordingly, Ofcom should also consider whether it remains appropriate to continue to use the net cost approach in relation to the cost of BT Sport in the VULA margin test.
6. The fundamental concern underlying the introduction of the VULA Margin Condition was the potential for BT to inhibit effective competition in the supply of high speed broadband services during a period in which significant numbers of consumers are taking up those services. In a previous submission on the approach proposed by Ofcom, Sky expressed a concern that using the net cost approach to the treatment of BT Sport in the VULA margin test may render it ineffective in achieving its intended aim. Sky stated:

¹ See, for example, paragraph 6.5.

² Paragraph 1.3 of the Consultation.

³ Paragraph 6.266. At paragraph 6.265 of its March 2015 Statement, Ofcom indicated that it understood Sky to have argued that a re-examination of this issue would be required if BT were found to have SMP in the provision of premium sports channels. This is not the case. Sky’s proposition did not depend on BT being found to have SMP in the provision of premium sports channels.



"BT may adopt an approach of offering BT Sport to consumers (i) in bundles with superfast broadband, and (ii) on a standalone basis, as it does currently with BT Sport on Sky's DTH satellite platform, and not wholesaling the product to downstream competitors. In this situation, consumers who prefer the superfast broadband services of a competitor to those of BT must "self-assemble" the bundle, i.e., to take superfast broadband services from their preferred retailer, and BT Sport from BT. This would afford BT the ability to distort effective retail competition by setting a high standalone price for BT Sport in order to make purchasing the bundle from BT a far more attractive option for consumers. As a result, even if downstream competitors matched BT's prices for superfast broadband they are unlikely to be able to compete effectively for consumers who have a demand for superfast broadband and the content carried on BT Sport. In this situation, the appropriate figure to use as the notional input price for BT Sport in the VULA margin test would be the standalone retail price for BT Sport.

*Ofcom has recognised in the consultation that there may be circumstances in which the net cost approach is no longer appropriate as a result of changes in the way BT distributes its channels (see for example paragraphs 6.128 and 6.141). Ofcom should equally recognise that an alternative to the net cost approach may need to be implemented in the event of other changes in circumstances, such as those outlined above."*⁴

7. The recently announced changes to the BT Sport retail proposition incorporating UEFA football include a significant increase in the standalone price - from £13.50 to £19.99 per month (or from £16.50 to £23.99 per month for the BT Sport channels in HD). The discounts that consumers receive if they purchase BT Sport as part of a bundle with BT Broadband have increased significantly. Furthermore, BT has tied purchase of BT Sport 1 (which will carry all BT's Premier League matches) to purchase of BT Sport Europe for standalone DTH satellite customers who do not purchase BT Broadband; whereas DTH satellite customers who purchase BT Broadband can receive BT Sport 1 only for free.
8. We estimate that the net cost per superfast broadband subscriber included in the VULA margin test is around **[Confidential]** per month. In circumstances where BT is now charging a minimum of £19.99 a month for access to its sports channels on a standalone basis, and tying the provision of BT's Premier League coverage to purchase of the BT Sport Europe channel, the use of the net cost approach to inclusion of BT Sport in the VULA margin test is manifestly inappropriate. Even if other providers offer broadband at a substantial discount to BT's equivalent broadband prices, it is unlikely to be enough for them to compete effectively for broadband subscribers who also value the content delivered by the BT Sport channel portfolio.

⁴ Paragraphs 6.10 - 6.11, BSKYB'S Response to Ofcom's consultation: Fixed Access Market Reviews: Approach to the VULA margin, August 2014. <http://stakeholders.ofcom.org.uk/binaries/consultations/VULA-margin/responses/Sky.pdf>.



9. We urge Ofcom to consider adopting implied charges for BT Sport within the test which would be more effective in achieving the purpose of the VULA margin test, namely the standalone prices charged by BT.

Sky

13 July 2015