

Note of Advice on Theft (and Related Issues)

1 Introduction

- 1.1 This advice has been requested in connection with DCUSA Change Proposal 54, which concerns revenue protection and the entry of stolen electricity into settlements. This paper deals with issues associated with the theft of electricity, and in particular the relevant roles of electricity distributors and suppliers.
- 1.2 In particular, the following four questions have been posed by the relevant Working Group:
- (a) which parties are able to take physical remedial action to stop theft from happening (i.e. disconnection and reparation)?
 - (b) which parties have the right to charge the customer for any electricity taken illegally and for the costs of the associated theft (e.g. replacing damaged equipment, the cost of investigation etc)?
 - (c) where costs are recovered by a party how should the income received be treated by that party?
 - (d) which parties have the obligation to enter units into settlement?
- 1.3 These questions have been considered in the context of the following scenarios:
- (a) the theft of electricity from the distribution network - i.e. abstraction from the mains cable, the service cable or the cut-out ("**Scenario A**");
 - (b) the theft of electricity from the supplier's equipment - i.e. theft by way of abstraction from above the cut-out but below the meter, or meter tampering ("**Scenario B**"); and
 - (c) the theft of electricity from another consumer's equipment - i.e. abstraction of electricity from above the meter ("**Scenario C**").
- 1.4 In Scenarios A and B stolen electricity is unmetered the resulting shortfall between electricity entering the distribution system and metered output is accounted for as part of the distributor's line losses. In Scenario C the stolen electricity is metered and "supplied" to the innocent consumer through whose meter it has passed.

2 Meaning of "Theft"

- 2.1 The term "theft" has been used in this paper as shorthand for the offence of abstracting electricity created by section 13 of the Theft Act 1968. Section 13 provides that, *"a person who dishonestly uses without due authority, or dishonestly causes to be wasted or diverted, any electricity shall on conviction on indictment be liable to imprisonment for a term not exceeding five years."*
- 2.2 Abstraction of electricity contrary to section 13 would not fall within the strict legal definition of theft provided by section 1 of the Theft Act 1968. The circumstances envisaged by Scenarios A, B and C would all constitute an offence under section 13 of the Theft Act 1968.

- 2.3 The theft of electricity may also constitute an offence under section 1 of the Criminal Damage Act 1971, if the process of abstraction damages or destroys equipment belonging to the distributor, the supplier or another consumer. Meter tampering may result in offences being committed under section 2 of the Fraud Act 2006.
- 2.4 Those stealing electricity in Scenarios A and B may also commit offences under the Electricity Act 1989 ("the EA") -
- (a) Where the theft of electricity involves damage to a distributor's equipment (Scenario A) or damage to a supplier's equipment (Scenario B), an offence will be committed under paragraph 6(1) of Schedule 6 to the EA.
 - (b) Interference with a meter so as to prevent it from registering the amount of electricity supplied (Scenario B) constitutes an offence under paragraph 11 of Schedule 7 to the EA.
 - (c) The restoration of a connection without consent is an offence under paragraph 5(2) of Schedule 6 to the EA. Depending on the circumstances in which abstraction occurs, in Scenarios A and B may entail an offence under this paragraph 5(2).
- 2.5 The prosecution of criminal offences is a matter for the police and the Crown Prosecution Service, and on conviction offenders will face fines or prison sentences. The criminal justice system will not require offenders to repay distributors or suppliers for electricity used or other costs associated with theft.

3 Question 1: Which parties are able to take physical remedial action to stop theft from happening (i.e. disconnection and reparation)?

Summary

- 3.1 The EA broadly provides that if the distributor's or the supplier's equipment is damaged or interfered with, the distributor or the supplier respectively is able to disconnect relevant premises. This means that generally the distributor will be able to disconnect in cases of theft in Scenario A and the supplier will be able to disconnect in cases of theft in Scenario B.
- 3.2 Any necessary reparation works on the distributor's or the supplier's equipment could be undertaken by the distributor or the supplier respectively in accordance with their general access and maintenance rights. Entry to the customer's premises to effect such works would require the customer's consent or a warrant obtained under the Rights of Entry (Gas and Electricity Boards) Act 1954.
- 3.3 Because theft of electricity in Scenario C will not generally result in any damage to or interference with a distributor's or supplier's equipment, no disconnection rights will arise under the EA.

Scenario A

- 3.4 Theft of electricity in Scenario A will usually involve damage (intentionally or by culpable negligence) to the electrical line or electrical plant provided by the distributor, constituting an offence under paragraph 6 of Schedule 6 to the EA.

Paragraph 6(2) of Schedule 6 provides that, where such an offence has been committed "*by the occupier of any premises (or by the owner of the premises if they are unoccupied when the offence is committed) ... the distributor may disconnect the premises*".

- 3.5 Thus, in most instances of Scenario A, the distributor will be able to disconnect the relevant premises.
- 3.6 Alternative disconnection rights may arise under paragraph 5 of Schedule 6, if the abstracted electricity is supplied to premises which have already been subject to disconnection. The paragraph 5 disconnection rights will rest with the distributor or the supplier, depending on who effected the original disconnection.

Scenario B

- 3.7 Theft of electricity in Scenario B will usually involve damage to the electricity meter, or interference with the meter. Where the meter is intentionally or by culpable negligence damaged by the occupier of any premises (or by the owner where the premises are unoccupied) paragraph 6 of Schedule 6 to the EA allows the supplier to disconnect the premises.
- 3.8 In circumstances where the meter is interfered with, but not necessarily damaged, paragraph 11 of Schedule 7 to the EA will allow disconnection by the supplier. Paragraph 11 allows for disconnection and removal of the meter by the supplier "*if any person intentionally or by culpable negligence - ... alters the register of any meter used for measuring the quantity of electricity supplied to any premises by an authorised supplier; or ... prevents any such meter from duly registering the quantity of electricity supplied.*"
- 3.9 If the abstracted electricity is supplied to premises which have already been disconnected alternative disconnection rights in respect of the abstracted supply may arise under paragraph 5 of Schedule 6 to the EA.
- 3.10 The supplier also has a power to disconnect if a customer has not paid all charges due from him to the supplier in respect of the supply of electricity to premises (paragraph 2 of Schedule 6 to the EA). This power may arise where the person abstracting electricity has an actual or deemed¹ contract with a supplier, such that the supplier may charge him for the stolen electricity once theft is identified. However, it should be noted that disconnection under paragraph 2 is not possible until 28 days have elapsed from a written request for payment from the supplier. In cases of theft, it would seem likely that one of the alternative disconnection powers discussed above would have been used before this 28 day period had expired.

Scenario C

- 3.11 No statutory powers to disconnect arise in Scenario C, as theft of electricity from above the meter does not involve interference with either the distributor's or the supplier's equipment.

¹ Deemed contracts arise under Schedule 6 to the EA, where a supply of electricity is made to a premises otherwise than pursuant to an express contract.

- 3.12 It is likely that theft in Scenario C will be identified when the innocent consumer receives an electricity bill which has been inflated by the abstracted supply which is running through his meter. In these circumstances, the innocent consumer is likely to be willing to co-operate with the distributor or the supplier in disconnecting the abstracted supply.

Rights in Contract

- 3.13 It is also worth noting that distributors and (particularly) suppliers may well have contractual rights to disconnect in the case of theft or interference with equipment (under their connection agreements and supply contracts respectively). Where such wording is included, it is likely to be less specific than the statutory wording, and may allow for disconnection in all of Scenarios A, B and C.

- 4 Question 2: Which parties have the right to charge the customer for any electricity taken illegally and for the costs of the associated theft (e.g. replacing damaged equipment, the cost of the investigation etc)?

Summary

- 4.1 Rights to recover the costs associated with electricity theft are summarised in the table below:

Costs	Recoverable under	Recoverable by
<u>Scenario A</u>		
Value of electricity abstracted	Paragraph 4 of Schedule 6 to the EA	Distributor
Damage to distributor's equipment	Tort	Distributor
Costs of investigation	Tort (but may not be recoverable)	Distributor
<u>Scenario B</u>		
Value of electricity abstracted	Supply contract	Supplier
Damage to supplier's equipment	Supply contract or tort	Supplier
Costs of investigation	Supply contract (depending on wording of contract) or tort (but may not be recoverable)	Supplier
<u>Scenario C</u>		
Value of electricity	Supply contract (but recoverable from the	Supplier

abstracted	innocent consumer rather than the perpetrator of the theft)	
Value of electricity abstracted	Tort	Innocent consumer
Costs of investigation	Unlikely to be recoverable	

Scenario A

- 4.2 The distributor has a statutory power to recover from the customer the value of electricity "*taken in the course of being conveyed by an electricity distributor*" (paragraph 4 of Schedule 6 to the EA). This power may be used by the distributor to recover the value of electricity taken in Scenario A.
- 4.3 In Scenario A the distributor may also have suffered losses in terms of damage to his equipment. It may be possible to recover these losses by suing the perpetrator of the theft in tort² (the relevant tort being the "wrongful interference with goods" under the Torts (Interference with Goods) Act 1977).
- 4.4 To successfully claim damages in tort, losses must be a direct result of the defendant's actions, and must be reasonably foreseeable. Distributors should, on the basis that it is reasonably foreseeable that interference with electricity distribution equipment is likely to result in damage to that equipment, be able to recover the costs associated with the repair of equipment damaged by perpetrators of theft.
- 4.5 Other associated costs, and in particular the costs of investigating electricity theft, may also be recoverable, at the discretion of the court. The court may refuse to award damages in respect of costs which it considers too remote from the defendant's actions or which are disproportionate to the damage caused by the defendant. Thus it may not be possible to recover the costs of routine investigations, which would have taken place regardless of the defendant's activities, or costly investigations which reveal only minor damage to equipment.
- 4.6 Distributors may have additional rights in contract under their connection agreements, but this is only likely to be the case in bespoke connection agreements.

Scenario B

- 4.7 The supplier has no statutory power to recover the value of stolen electricity equivalent to that of the distributor discussed in paragraph 4.2 above, and as the electricity in Scenario B is being stolen from above the cut out it is no longer "*in the course of being conveyed by an electricity distributor*" and so the distributor may not use his EA powers to recover its value.

² "Tort" is the generic legal expression used to describe those civil (as opposed to criminal) causes of action that exist outside of contract law.

- 4.8 However, the absence of such a statutory power should not be fatal to the supplier (whether its omission was intended or not), as the supplier will almost always have a contractual relationship with the person committing the theft – either through an express supply contract, or (perhaps more likely) a deemed supply contract. Suppliers should ensure that their supply contracts refer to all electricity consumed at the premises, regardless of whether or not such consumption was registered by the meter.
- 4.9 Suppliers should be able to raise an invoice for the stolen electricity under their supply terms. Where this amount is not paid, suppliers can then bring damages claims for breach of contract.
- 4.10 Depending on the wording of the contract, it may also be that suppliers will be able to recover losses in respect of damage to their equipment and/or investigation of theft. It is easier to recover associated costs in contract than in tort and unless the particular provisions of the supply contract exclude the supplier's ability to do so, we would expect a supplier to be able (at least in legal theory, if not in practice) to recover the costs of its investigation from the consumer.
- 4.11 In the unlikely event that no supply contract does exist, the supplier may in the alternative be able to recover his loss in respect of any damage to his equipment under the tort of wrongful interference with goods (as discussed in relation to the distributor above at paragraphs 4.2 to 4.5).

Scenario C

- 4.12 The position in respect of recovery in Scenario C is more complicated. In Scenario C the supplier's contract will be with the innocent consumer rather than the perpetrator of the theft, and there will be no interference with the distributor's or the supplier's equipment, and so no possible claim for either in tort.
 - 4.13 In strict legal terms, there should be a chain of recovery: the innocent consumer should be able to recover the value of the electricity stolen from the perpetrator of the theft, and the supplier should charge the innocent consumer for all of the electricity which has passed through his meter (on the basis that he will be able to recover it from the thief).
 - 4.14 In practice, however, this chain is likely to break down. The supplier is probably unlikely to hold the innocent consumer to a hugely inflated electricity bill, and the innocent consumer is unlikely to be able to recover any money from the thief. While obtaining a judgement against the perpetrator of electricity theft may be relatively straightforward, it will involve additional expense for the innocent consumer and there is no guarantee that the perpetrator will honour a judgement and actually pay any damages awarded.
 - 4.15 The supplier may be able to arrange with the innocent consumer to conduct legal proceedings against the perpetrator of the theft on his behalf, but any such arrangement would be at the discretion of the innocent consumer.
- 5 Question 3: Where costs are recovered by a party how should the income received be treated by that party?

Scenario A

- 5.1 If a distributor recovers the value of electricity abstracted under paragraph 4 of Schedule 6 to the EA there is no legal duty on him to apply the money recovered to any specific purpose.
- 5.2 This is in some ways curious. The electricity abstracted feeds into line losses (rather than consumption) and consequently: (a) deflates the use of system charges recovered by the distributor; and (b) impacts on the distributor's performance under the relevant incentives in its price control. However, the value of the electricity is not directly lost to the distributor (who never owned it). There is no requirement on the distributor to pay any money recovered under paragraph 4 to, for example, the supplier.
- 5.3 In circumstances where the distributor recovers money in respect of damage to his equipment, such damages will directly recompense him for costs incurred (and so will, rightly, remain with the distributor for its own benefit).

Scenario B

- 5.4 If a supplier recovers the value of electricity abstracted under an actual or deemed contract, there is no legal duty on him to apply the money recovered to any specific purpose.
- 5.5 If the supplier's right of recovery is for breach of a contractual term requiring the consumer not to steal electricity, this is the logical outcome. To the extent the supplier has incurred a loss as a result of the breach, the supplier will be able to recover damages in respect of that breach.
- 5.6 However, the supplier's right to recover may arise by virtue of supply contract wording which provides for payment in respect of electricity consumed (regardless of whether it is registered on the meter). In these circumstances, the supplier need not necessarily incur a loss in order to claim payment from the consumer (and will be able to sue for recovery of this debt in the event of non-payment).
- 5.7 If a supplier recovers in respect of damage to his equipment, such damages will directly recompense him for costs incurred in repairing his equipment (and so will, rightly, remain with the supplier for its own benefit).

Scenario C

- 5.8 As discussed above, it is unlikely that the distributor or the supplier will be able to recover any monies in Scenario C. If money was recovered by any party acting on behalf of the innocent consumer, it would have to be applied to the innocent consumer's losses - i.e. paying the inflated electricity supply charges and repairing his electrical equipment.

6 Question 4: Which parties have the obligation to enter units into settlement?

- 6.1 We have not been able to identify any provision that obliges either the distributor or the supplier to have the stolen units identified in settlements.
- 6.2 There is certainly no obligation in the EA or the respective licences. Nor could we identify an express obligation on our initial review of the BSC. We have not undertaken a detailed review of either the BSC or the MRA. However, we

understand that in discussions with Elexon, Elexon has been unable to identify any express provision of the BSC that deal with this point.

- 6.3 If there is nothing in the BSC, there could (conceivably) be something in the MRA. We would advise that an approach is made to Gemserv (if one has not already been made) to gauge their view of the issue.
- 6.4 We would (of course) be happy to undertake a detailed review of the BSC and/or the MRA. However, such a review would be relatively time consuming (and therefore costly), and we suspect that it would not reveal anything concrete on the issue.

7 Conclusion

- 7.1 We hope that you find this advice helpful. We are conscious that our response on questions 3 and 4 is not conclusive, or at least that it suggests a gap in the current policy.
- 7.2 The distributor has a statutory right to recover for stolen units, but the units have not been stolen from the distributor, and the distributor has no obligation to apply any recovered sum to any particular end.
- 7.3 The supplier has no comparable statutory right, but is likely to have rights in contract. However, the supplier will only truly have suffered a loss (or will only have suffered the full effects of the loss) if the stolen units are recognised in settlements. No one appears to be under a duty to report the lost units in settlements, and the party most likely to do so (the supplier) is unlikely to do so at its own volition (given the difficulties in reality of recovering from the thief).
- 7.4 We would, of course, be happy to explore this topic with you further should you wish us to do so.

Wragge & Co LLP (24 May 2010)