

Mediation as a model dispute resu



by Franz Büllingen

Electromagnetic compatibility with regard to the environment (EMCE) has been a focus of public controversy over the introduction of new technologies for several years. The debate is fuelled by the expansion of GSM infrastructure and 3rd generation mobile radio networks (UMTS). Despite basic acceptance of mobile radio – almost 80% of German citizens own a mobile phone nowadays – as well as the lack of scientific evidence of clear causal links between potential health deleterious effects and radiofrequency electromagnetic fields (EMF), the debate has been characterized by changing patterns of high-level argumentation since the early nineties, and its future course is open.

With the Voluntary Self-commitment, the Associations' Agreement and by establishing information portals providing data on radio siting or EMF-relevant knowledge, important measures have been taken by network operators and public authorities towards a de-escalation of controversy which, in part, are seen as exemplary in other countries. In spite of that, it cannot be excluded that conflicts will increase in future, considering not only the expansion of GSM und UMTS infrastructure but also the expansion of other radio technologies such as Public Wireless LAN, the digital

Results of a field trial as part of the EMCE debate

for alternative solution?

radio for public authorities and organizations with security function BOS, the new radio broadcasting technologies DAB-T and DVB-T, or WiMAX resp. Airdata, which will provide broad coverage areas for high-speed internet access.

There is great interest against this backdrop among all involved actors to reduce potential conflict and to re-establish trust. In recent years, modes of **alternative dispute resolution** (ADR) have been in part successfully tested in environmental debate, which are now recommended as a tool for conflict resolution by many political institutions such as the OECD, the European Commission, or the Regulatory Authority for Telecommunications and Posts (RegTP). Thus, it makes sense to take a closer look at this technique in order to decide whether it may also be an appropriate tool for de-escalating the controversy over EMCE. It is this background against which the Federal Ministry of Economy and Labour (BMWA) commissioned the Scientific Institute for Communication Services (WIK) to initiate a mediation process in a specific case and, in an accompanying research project, to find out to which extent ADR may be able to make an innovative and effective contribution to local conflict resolution within the framework of the debate over EMCE. The purpose of this accompanying study was to develop a scientifically documented and standardized model for mediation that could also be employed for various conflicts over antenna siting. The project was launched in July 2003 and completed in September 2004.¹

Two approaches were used to achieve this purpose. At first, all existing basic methods were analysed and evaluated with regard to their origin, their approach

to conflict resolution, practical applicability, efficiency and the cost involved. Methods included all concepts subsumed under the term „ADR“: mediation, planning cells resp. citizen expertises, consensus conferences, ombudspople, arbitration and (moderated) roundtables. In analysing these methods, the experiences in the United States, Austria and Switzerland were evaluated in an international comparative analysis. In a second step, two mediation experts were asked to do a substudy initiating and conducting mediation in a specific case. The conflict over the siting of a radio mast in Munich, involving the municipal environmental agency, was selected as a model case for mediation.

ADR: State of institutionalisation

Theoretical analysis of alternative dispute resolution modes shows there is high expectation world wide with regard to ADR as a tool for minimizing potential conflict both at the macro- and the microeconomic level can be found. A 1996 OECD study e.g. demonstrates that consensual resp. consocietal European democracies have a higher standard of living than societies with a high percentage of judicial disputes. The Local Agenda 21 from 1997 states that, besides a country's ability to take strategic action and promote innovation, also ability of social consensus is required to initiate a process of modernization and to implement basic innovative policies. It is against this backdrop that a 2002 EU Green Paper suggests to apply ADR in civil and commercial law and to develop an own professional code of conduct for mediators. Also the 2002 Universal Service Directive, in article 34, advises the member states to use alternative



dispute resolution as a tool of choice for the resolution of conflicts between telecommunication service providers and consumers.

In some EU countries, institutionalisation is well underway. The Austrian Regulatory Authority RTR e.g. has created a mediation centre for sector specific conflicts in 2003. In 2004, mediation was first included in the amended German Telecommunications Act (TKG; § 124) and the consumer protection regulation. Different normative and institutional framings go hand in hand with the concept that ADR shall not be a substitute of the formal judicial process but its complement. Cost and time savings are some of the expected advantages for potential conflicting parties, especially in business.

Methodically, mediation is based on the Harvard-Principle of appropriate negotiation. It has therefore been widely established in countries with a law tradition emphasizing negotiation, especially the United States („Uniform Mediation Act“) and Australia. In Germany, the implementation of this practice has not come very far yet, with the exception of the aforementioned examples. It is most successfully employed in family mediation and work place conflicts. Nonetheless, the environmental sector is seen as one of its central fields of application. The term environmental mediation comprises all issues where infrastructural plans might have negative consequences for the environment, for example noise exposure, resource consumption, immission loads, etc. Therefore, also efforts to de-escalate conflicts behind the debate over EMCE are subsumed under the term of environmental mediation.

Alternative dispute resolution modes in comparison

The primary goal when using ADR is to achieve sustained agreement between conflicting parties and conciliation of all interests by a professionally moderated process of discussion and negotiation. Special characteristics, compared to the formal ordinary court

procedure, are shorter expected implementation, reduced costs and greater privacy to broad public.

Typically, the different modes of alternative dispute resolution are mainly distinguished by the degree of intervention of neutral third parties. The central idea of **mediation** is the concept that there is no objective truth, but only subjective realities. It does not opt for a purely legal assessment of a conflict, but focuses on the interests of participants. A neutral, impartial third party (mediator) assists the conflicting parties in finding a sustained consensus solution. In contrast e.g. to a judge, the mediator has no own decision-making authority. Instead, he creates the necessary conditions in terms of adequate assistance of proceeding. All participants are involved in finding a solution and bear responsibility for the outcome. There is the expectation that long and costly legal processes thereby can be avoided and that results will be sustained resp. more widely accepted.

Planning cells resp. citizen expertises are based on a concept developed in Germany aiming for broad and representative participation of the general population. Randomly selected citizens are bestowed the possibility to exert an influence on their living surroundings by means of so-called planning cells. Sometimes several planning cells work on one task at the same time. Competent moderators resp. experts monitor the decision-making process, the result of which is eventually put forth in a so-called citizen expertise. Increasingly, such citizen expertises serve as a basis for consultation and planning done by political decision-making bodies. The process is faster, but comparably expensive compared to other strategies. Nevertheless, there are many positive examples of successful use of this tool, mainly at the municipal level.

The concept of **consensus conferences** has been developed in the United States. Its main characteristic is that randomly selected lay persons and experts jointly discuss problems related to new technologies or conflict-filled issues. On the basis of newly gained



insight, laypersons then develop guidelines e.g. for infrastructure projects that are submitted to political decision-making bodies and presented to the broader public. The aim is to provide solid information, thereby indirectly fostering de-escalation or even conflict avoidance in case of early implementation. Nowadays consensus conferences are particularly popular in Denmark. They are also relatively expensive.

Ombudspeople are increasingly used in European countries since the fifties of the last century. They are intended to protect citizens against arbitrary action of public institutions, but are also used by administrations in the case of unjustified accusations raised by citizens. Over the years, branch specific ombudspeople have been appointed e.g. in Switzerland, Sweden and the United Kingdom – e.g. in insurance and credit business – where they are to deal with complaints of dissatisfied customers and shall act towards consensus resolutions in conflicts with companies. Recently appointed EMCE ombudspeople in Switzerland however are mainly responsible for the mediation of information.

Arbitration, one of the oldest methods of alternative settlement of disputes, comes nearest to ordinary court procedures. There is a strong orientation towards existing legal norms. An important difference with ordinary court procedures is that concerned parties select the arbitrator themselves. Moreover, the decisions of arbitration courts are not contestable, e.g. in terms of appeal procedure. Arbitration is comparably fast, efficient and cost-effective, but does not always lead to a generally accepted result.

Roundtables offer a forum for discussion of current, mainly municipal political issues, in particular characterized by their orientation towards participation. There is no uniform methodology or standardized protocol. Also, roundtables have often been moderated, thereby leading to a considerable increase in effectiveness. The focus is on objective discussion involving all interest groups in order to structure conflicts and search for consensus resolutions and positions. The

tendency of participants, especially during unmoderated events, to remain noncommittal and to lose their focus on problem solving, can sometimes result in a distinct decrease in effectivity of this method.

It can be noted that there are different methods clearly distinguished by their origin, their goals, their ways to reach a solution, their practical application, effectivity and their average required time and budget. Also, the intensity of intervention of neutral third parties, as well as their influence on results, are very different. An important result of the study is the insight that, for all methods, there is a lack of experience with regard to EMCE issues. The BMWA project is therefore a first milestone towards gaining experience with ADR in general, and mediation in particular.

Experiences with ADR in other countries

There is a long history of using mediation in the United States. Especially in work place conflicts, mediation was used already in the early 20th century. Environmental mediation was first used in the sixties and is now fully integrated in the existing framework legislation, due to the positive outcome, especially in infrastructure issues. In Europe, mediation was more intensely discussed as late as in the seventies and the eighties. It was first applied in the nineties, primarily with regard to infrastructural measures. However, though mediation has been talked about much in the European countries, efforts to promote its use are not very strong.

Initial limited experiences with environmental mediation have been made in Europe, especially in Austria and Switzerland. The Austrian Law on Mediation, put in force in 2004, was a first step towards legalization of this method in Europe. Evaluation of practical experience with this law will be available in the middle-term future. But our study shows that neither Austria nor Switzerland, the countries investigated in comparison, have gained no special experience with mediation in EMCE issues. The pilot study is therefore of high relevance, not only at the national level.



Initiation and investigation of the model conflict

The basis of study was a model conflict in Munich was used, which was demonstrated to be highly appropriate with regard to the controversial issue of mobile radio mast siting. A radio mast located in the vicinity of a school and a kindergarten caused conflict between the parents of the children and the network operator. Early on, the conflicting parties signalled their readiness to participate in mediation. Other conflicting cases had been scrutinized before, but were shown to be much less appropriate, due to an observed lack of motivation to participate in the study, etc.


At the time of first contact with the conflicting parties, the patronage of the BMW, the transparency of the project structure, the impartial accompanying scientific research, the use of independent mediators

and the quality of information were crucial factors for the launch of the model case. The mediation process was initiated in August 2003, with a three-month organizational preparatory phase. The first session took place in November 2003. In December, the process was completed after a six-week phase of negotiation and search for a solution. The subsequent implementation phase was finished in July 2004.

A methodological validation of the performance model followed. In a first step including all participants, an ex-ante interview was conducted to document the attitudes and opinions of all participants prior to mediation. In the following, participatory observation was used identify and to document the concrete interaction during mediation, both group-dynamic effects and external influences. The final ex-post interview highlighted the assessment of participants of the process; conclusions were drawn on the adequacy of methods and on portability. As there was a prolonged phase of negotiation and search for alternative sites after an agreement on mediation was achieved, the WIK conducted a second ex-post interview in July 2004. Furthermore, (interim) results were repeatedly discussed with different experts from science and politics in order to ensure validity.

Four conflicting parties were involved in the Munich model case, who, at the start of the project, declared in writing that they were willing to participate in mediation for the resolution of their conflict. Aside from the two mediators and the WIK project monitors, representatives of the Department of Health and Environment of the City of Munich, parent representatives from an elementary school, representatives from a kindergarten and of the network operator Vodafone took place in mediation.

Over the course of the sessions, after agreement on the rules for communication was achieved, the initially strained relations between the parties gradually improved. Technical and other information was provided, especially by the network operator, and open and result-oriented discussion took place. All partici-



pants agreed that the base station installed vis-à-vis an elementary school four years ago, at a distance of about 100 m from the kindergarten, was little acceptable for technical reasons and on the grounds that acceptance was lacking. Therefore, alternative options were to be looked for within a defined area. All participants demonstrated from the start that they were willing depart from their basic positions to keep an open mind and help to work out constructive solutions. Thus, the conflict was much less acute than many other conflicts over antenna sitings.

The mediation process at first led to a result that was seen as positive by all participants: After about six sessions participants managed to agree on a new site. It was the roof of a bank, selected because of positive measurement results and immission calculations, social acceptance, possibilities to conclude an agreement with the owner and economic considerations from the perspective of the network operator. After detailed discussion, all participants confirmed the agreement. Thus, the network operator was free to begin negotiations with the owner. Problems arose, however, from the fact that the owner, as an indirectly concerned party, had not been involved in the mediation process. He voiced basic structural concerns with regard to the selected site. The process was delayed considerably, and prolonged negotiations ensued. It was only in July 2004 that a new, coincidental solution was found and agreed on, in the sense of a second-best solution. This result was evaluated by all participants as being basically more or less unsatisfactory.

Results of accompanying research

From the perspective of accompanying research, the model conflict at first met essential requirements for the performance of the mediation process. Conflict and dispute intensity at the start of the process have to be characterized as moderate, since there was e.g. no organized protest on location. The constructive attitude of all participants at the beginning of the procedure was a basic requirement for the initial pos-

itive result. These requirements are not always met though. With the start of negotiations and the search for alternative sites launched in early 2004, relations between participants visibly deteriorated and discussion grew sharper in tone. While the mediation process had been welcomed at first and there was a cautiously positive outlook in the first ex-post interview (December 2003), the final ex-post interview (July 2004) was characterized by considerable scepticism. The process itself was characterized by many participants as „inadequate“ with regard to its duration and costs, transparency and fairness, and aptitude of the procedure. Moreover, the absence of relevant decision-makers was criticized.

In all, evaluation showed that results and progress achieved by mediation to a great extent depend on many factors, which can differ a lot across individual cases of conflict over siting. These factors are e.g. related to the willingness of the involved parties to actively engage in negotiations; the selection of participants and their legitimation towards other interested persons; their communicative competence; the provision of sufficient information; availability of alternative resolutions, and straightforwardness and transparency of the total problem. Thus, several subjective components play a very crucial role in mediation with regard to its successful initiation and its course. They introduce a fundamental and ultimately inevitable risk into the mediation. Part of this risk is that „negative negotiation results“ are always a possibility.

Conclusion

The mediation process therefore cannot not - or only to a certain extent - be characterized as a purposeful approach to conflict resolution in the debate over EMCE. The goal of the project, namely to develop a scientifically documented and, even more important, standardized model that is applicable to different types of community conflict was not achieved. There is much evidence leading us to conclude that each conflict related to EMCE is unique, due to complex




influential factors and frameworks, and that mediation can always fail. Considering the many thousands of cases of conflict and the substantial financial implications of each individual case to be resolved, it becomes obvious that mediation is not adequate to cover all cases of conflict in Germany.

With regard to procedural aspects of a model action, the great expenditure of time and resources required for its performance must also be considered. Several months were needed to establish the case of conflict and the model action. It took another seven months to negotiate alternative resolutions. So not only set-up costs were very high, but also time and real expenditure for the performance of further negotiations and implementation. Moreover, analysis of group-dynamic processes in the present case show that the intense cooperation of participants can also result e.g. in the mediators giving up their neutrality and seeing themselves as advocates of involved citizens. Against this backdrop, it becomes obvious that mediation certainly may contribute to local conflict resolu-

tion, but that this contribution is also to a great extent affected by existing frameworks. In the present case, the preferred solution could not be employed, due to the lack of consent of an actor who had not been involved in the mediation. Obviously, conflict mediation will only be successful when there is a sufficient number of alternative solutions and all relevant decision-makers can be made part of the process.

Furthermore, the substantial use of resources poses the question whether mediation processes would really be cost-effective. If network operators or political actors wanted to use mediation in all (network topologically) significant cases of conflict, the potential consequence would not only be a great (additional) delay in network expansion, but also immense costs. Considering expenditure and outcome, also the experts interviewed by us think that the use of mediation should be limited to purposeful application in socially significant cases of conflict with high economic expenditure (airports, highways, etc.). This is



especially true against the backdrop that network operators have less and less to fear from court processes. After the decision of the Federal Constitutional Court and many related decisions of Superior Administration Courts the prospects of success of citizens going to the courts to seek resolution of siting conflicts are very low.

Moreover, our analysis demonstrates that mediation is not appropriate for the regulation of fundamental issues or for resolving value conflicts. Many issues and problems related to the debate over EMCE cannot be resolved by this technique. Other pilot projects should therefore be considered to investigate techniques that seem more appropriate to achieve this goal. This refers mainly to citizen expertises or moderated roundtables. An essential contribution to conflict resolution related to the debate over EMCE could be made this way. The proposal coming from politics that mediation should be made mandatory by law with regard to siting conflicts, seems to make no sense against the backdrop of the insight gained in our feasibility study. On the one hand, a regulatory measure such as this would not account for the fact that public institutions and network operators have a vital interest in sustained consensus solutions related to EMCE. Regulatory measures therefore would not only inhibit initiative of participants, but also unnecessarily reduce their own action radius. On the other hand, the proportion between expenditure of resources and potential outcome would be strongly distorted. This is especially true in light of the fact that mediation – as shown above – is only one technique among many others. Basically, self-regulatory problem solving approaches should thus be prioritised.

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¹ The results were published in November 2004 in the WIK discussion paper no. 258, titled: „Alternative Streitbeilegung in der aktuellen EMVU-Debatte“, by Franz Büllingen, Annette Hillebrand and Diana Rätz.