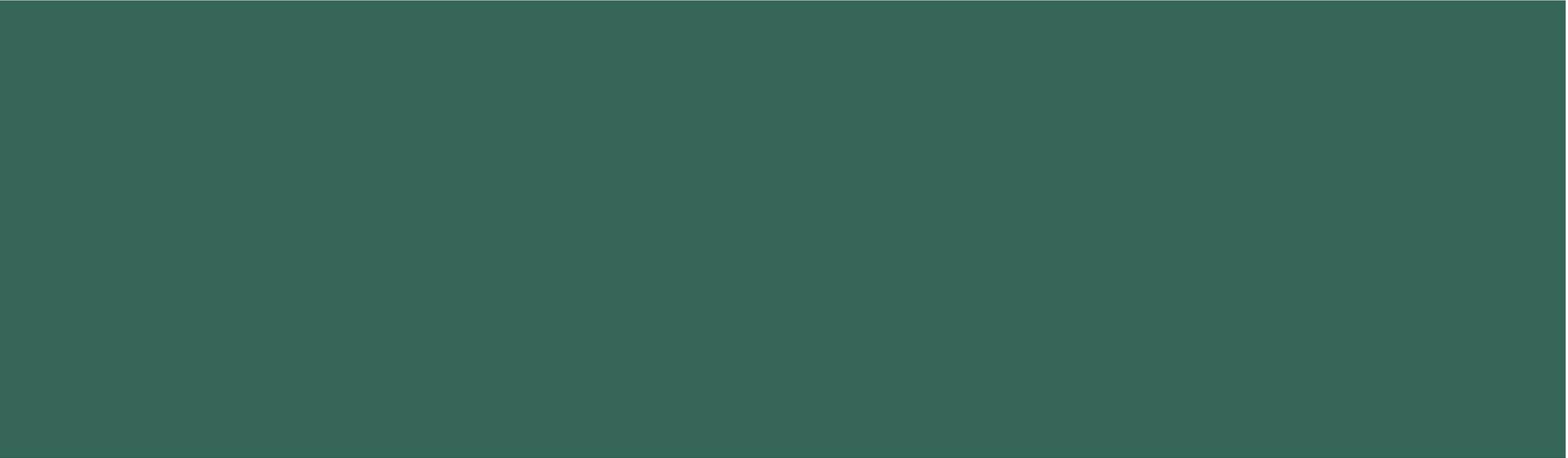


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# ALTERNATIVE & INNOVIATVE METHODS OF ENVIRONMENTAL ENFORCEMENT IN IRISH LAW

TOM FLYNN B.L.



# INTRODUCTION

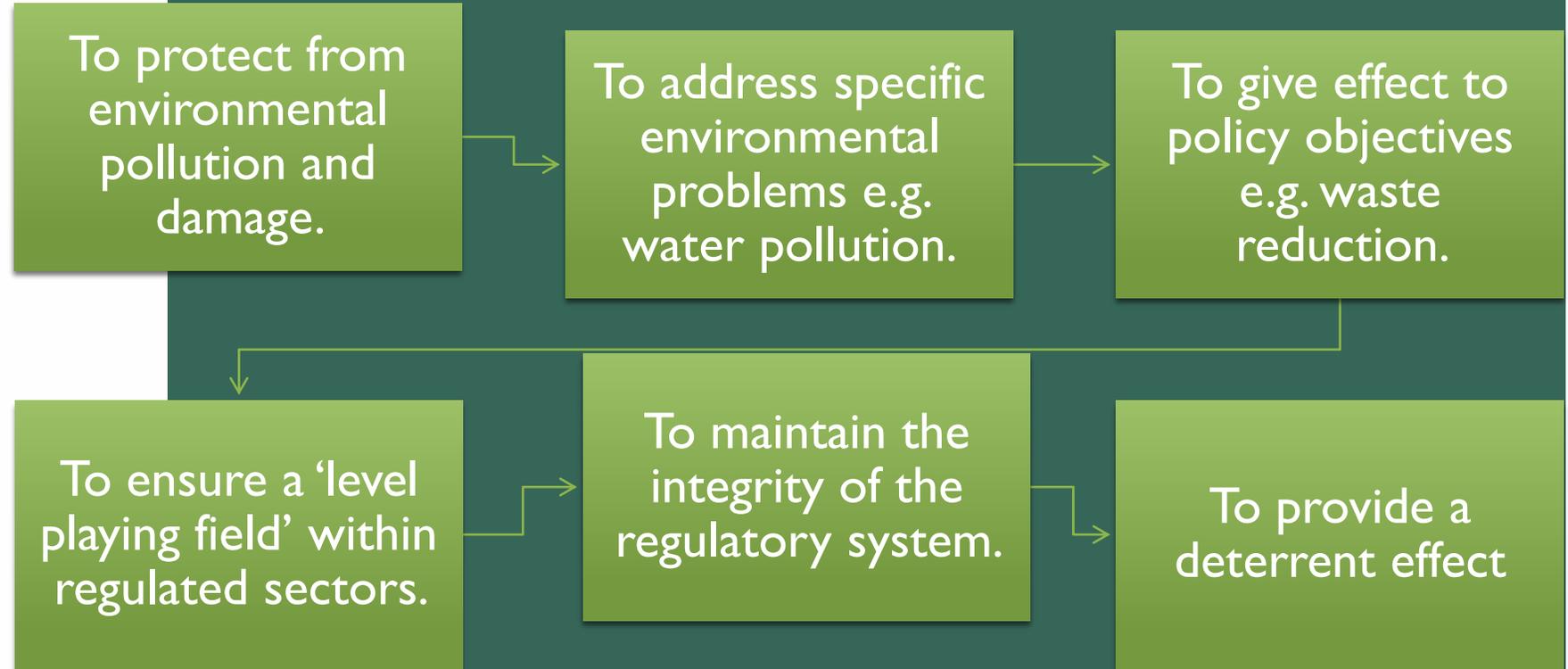
**The Overarching Theme of Conference:** is an exploration of the legal issues surrounding Environmental Responsibility, Accountability and Liability both in international and Irish law.

A key issue in this context is how to ensure the effectiveness of enforcement of environmental law ?

This requires an analysis of the limitations of the existing regulatory system and an assessment as to how it can be improved and in particular what alternatives methods of enforcement can offer

What follows is an exploration of these issues in an Irish context.

# WHY IS EFFECTIVE ENFORCEMENT OF ENVIRONMENTAL LAW ESSENTIAL ?



# WHY WE NEED EFFECTIVE ENFORCEMENT

- When legislation is effectively enforced it changes behaviour !



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The current enforcement model has evolved over time – it is not a bespoke model.

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As a consequence it does not adequately address the unique nature or consequences of environmental pollution and damage or crime.

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It is primarily a ‘traditional’ regulatory model - a centralised ‘hierarchical’ direct ‘command & control’ system as applies in other areas of law with at best minor modifications for environmental law.

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Legislation is enacted with provision for enforcement by a prescribed authority and/or the public using well established legal techniques

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## THE EXISTING ENFORCEMENT MODEL

# PROBLEMS WITH THE ENFORCEMENT MODEL

Enforcement is via a variety of civil and criminal legal remedies e.g. injunctions and criminal sanctions within the traditional legal system using the pre-existing courts system and procedural rules.



Traditional legal principles apply e.g. onus/burden of proof, requirement to meet rules of evidence and application of traditional sentencing principles to environmental crimes.



Significant reliance is placed on criminal sanctions to secure enforcement.



Some limited moves away from this traditional model e.g. Administrative Sanctions/Financial Penalties.

The existing enforcement model is 'resource rich'

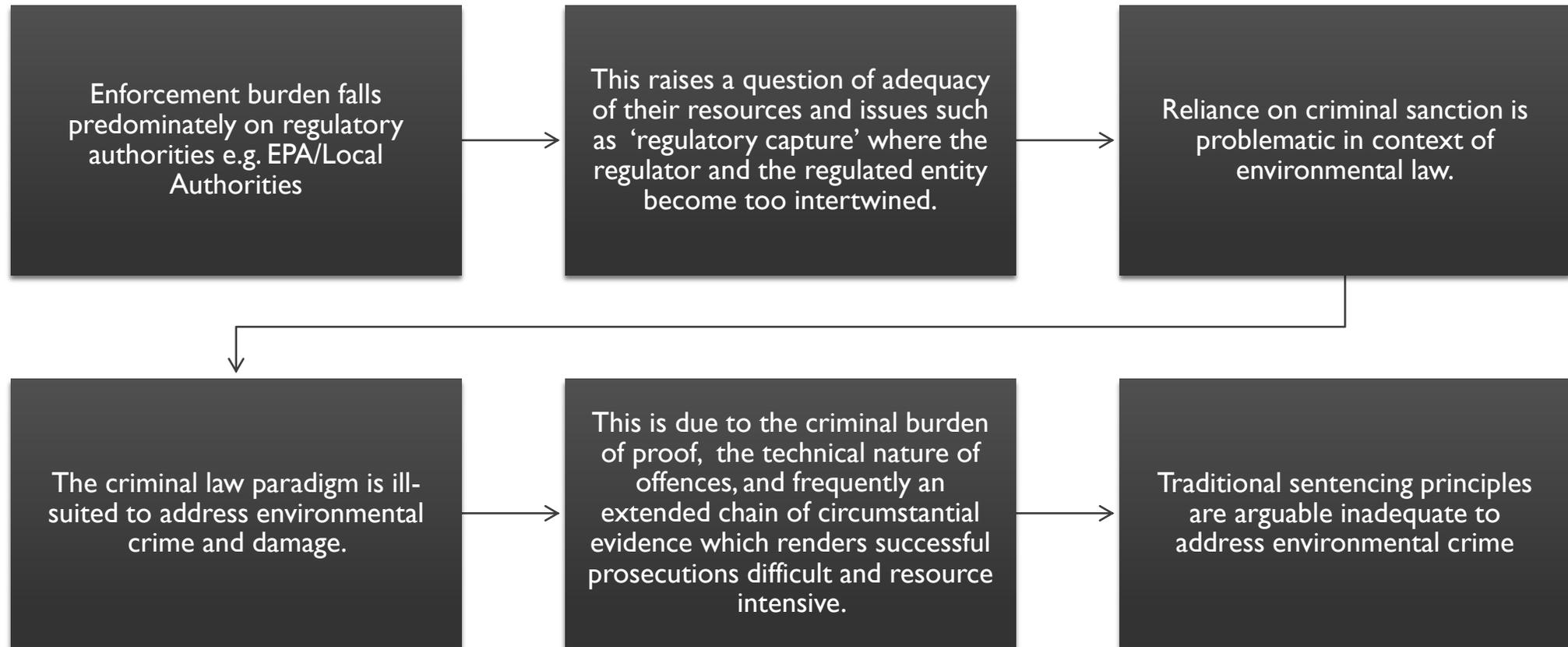
It imposes significant resource burdens on all actors in the system – litigants – enforcement authorities – the courts – and those regulated ?

For the existing enforcement model to be effective it requires all actors to have effective access to the Courts.

Is this possible given barriers to access in form of costs/delays ?

Limited 'private citizen' enforcement despite fact that legislation makes provision for it e.g. s.57/58 WMA 1996 and provision for 'costs protection' under s.3 of EMPA 2011 – strengthened following recent judgement of the CJEU in C -470/16 NEAP

## LIMITATIONS OF EXISTING ENFORCEMENT MODEL (I)



## LIMITATIONS OF TRADITIONAL ENFORCEMENT MODEL (2)

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It can be difficult to evaluate the effectiveness of the current enforcement model and any assessment will be contentious – what is the appropriate metric for evaluation ?

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At the outset we need to acknowledge some recent improvements – establishment of Office of Environmental Enforcement

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OEE has developed enforcement networks & performance indicators for LA - clearly positive development.

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It arguable that the Irish environmental legislation is not materially deficient in terms of its provisions in respect of enforcement and penalties for breach of environmental law.

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For reasons already highlighted difficulties arise in the application of the legislation in practice e.g. securing compliance with court orders

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Resources within the regulatory authorities and the courts system are a particular problem.

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## EFFECTIVENESS OF TRADITIONAL ENFORCEMENT MODEL (I)

## EFFECTIVENESS OF CURRENT ENFORCEMENT MODEL (2)

- Irrespective about the debate about the effectiveness of current enforcement system it cannot be disputed that significant environmental challenges remain:
- *“Ireland’s environment is generally good and it can be concluded that on the whole Ireland does present a clean, safe environment to live in. While the overall quality of Ireland’s natural environment is “good” this has to be qualified. There are many challenges surrounding its protection both for now and into the future, along with more immediate local environmental issues such as air quality, water pollution, odours and noise that need to be resolved. Many of these problems can be masked by national level assessments but can have severe impacts on the health and wellbeing of the people in individual communities and on the quality of the local environment”*

**EPA Ireland’s Environment – An Assessment 2016**



THERE IS ALWAYS ROOM  
FOR IMPROVEMENT !



Limitations of existing enforcement model is recognised and is the subject of debate both here and abroad

Reflected in EU policy and law which has shifted toward a blend of regulatory measures with consequences for enforcement

Much of this debate focuses on the need to reduce the 'regulatory burden' e.g. EU's 'Smart Regulation'

Alternatives to existing model should not mean no/weaker regulation or enforcement

Recognise that more legislation/enforcement is not **always** the answer

## ALTERNATIVES TO EXISTING ENFORCEMENT MODEL

**Fiscal/Market-based mechanisms –**  
Aim to deploy market forces to control adverse environmental activity.

They rely on the assumption that the 'market' is efficient and that individuals and organisations will avoid adverse environmental activity if there is a cost attached to it .

Proponents argue they are more flexible and effective than 'traditional' forms of regulation & promote innovative technical solutions to environmental pollution/problems. Can take many forms, environmental taxes, pollution credits, and tradable emissions.

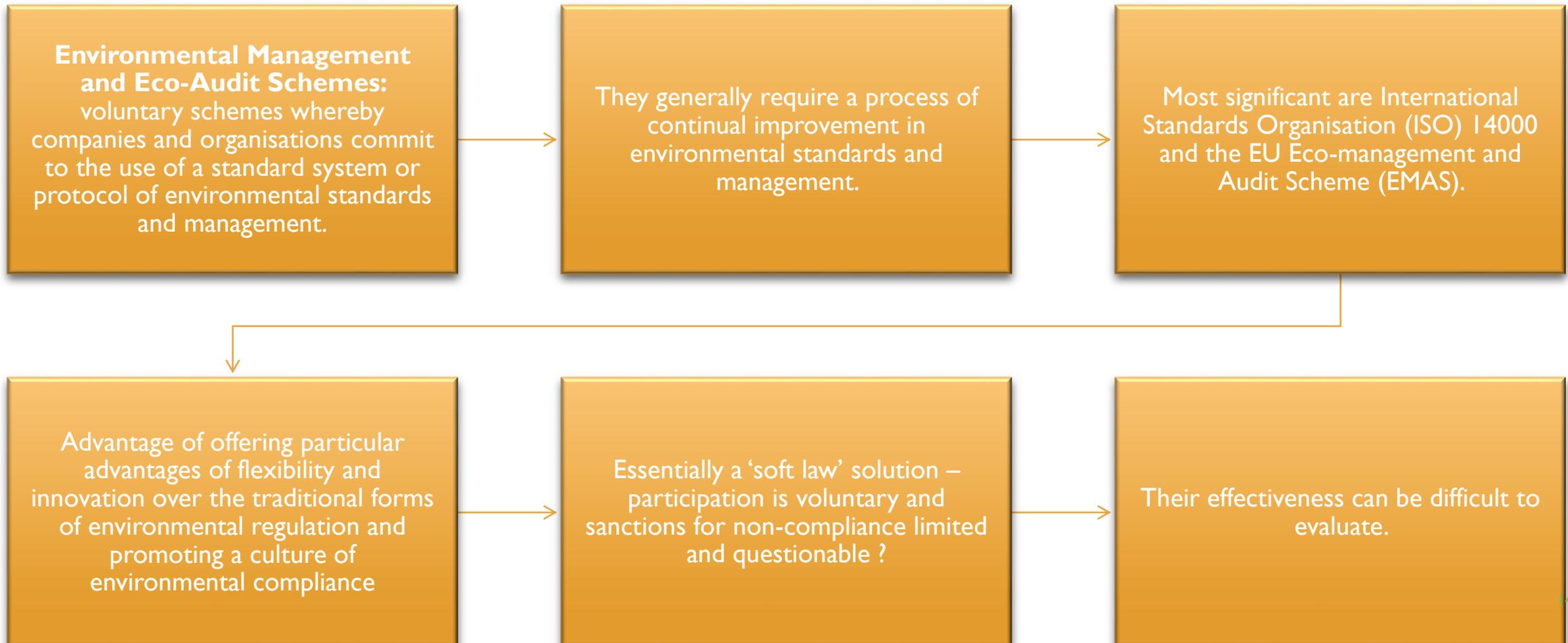
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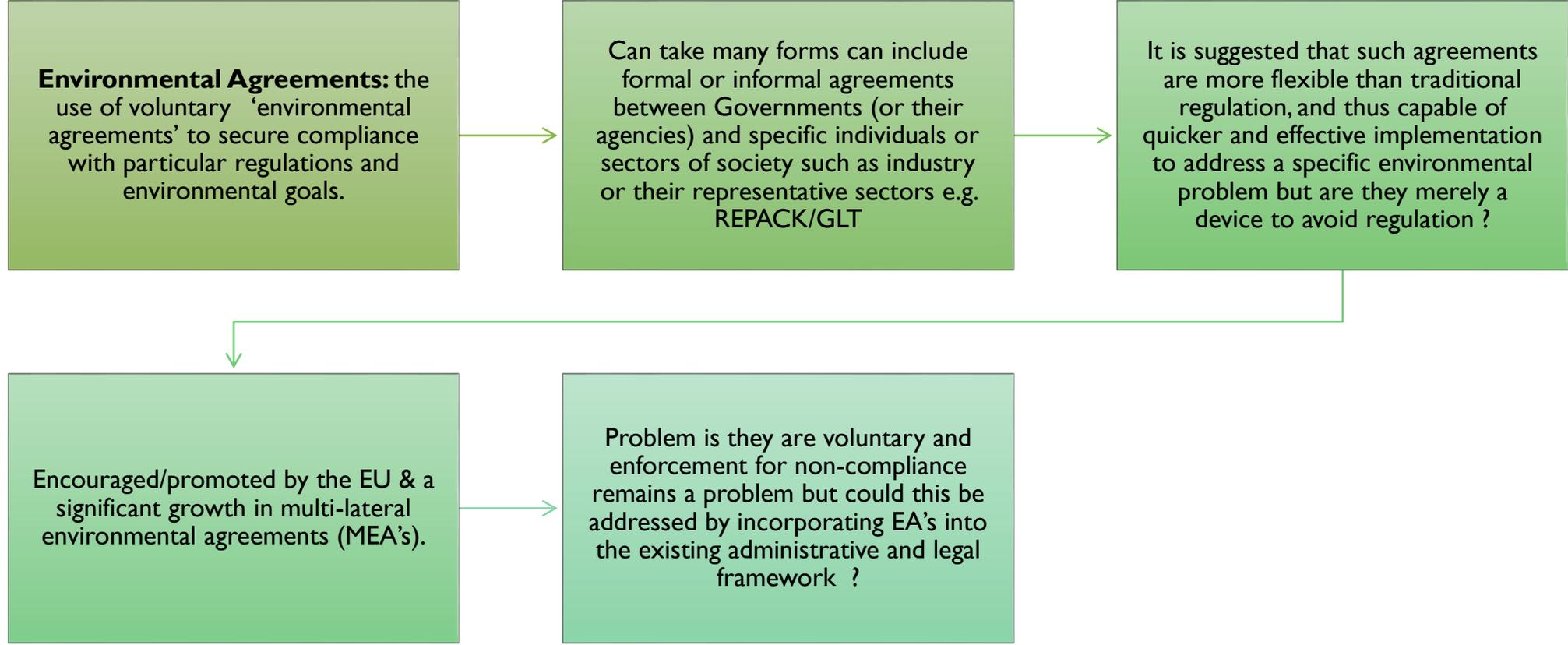
Examples in Irish Context - 'plastic bag levy'/ Green House Gas 'emissions trading scheme'.

Problem is they (a) normalise pollution (b) ignore the fact the 'market' is can be imperfect and (c) can result in unintended consequences e.g. Re-balancing of VRT tax in favour of low CO<sub>2</sub> emission cars resulting in growth in purchase of diesel cars with polluting particulate matter and nitrogen oxides (NO<sub>x</sub>) emissions

## ALTERNATIVES TO EXISTING ENFORCEMENT MODELS

# ALTERNATIVES TO EXISTING REGULATORY MODELS





# ENVIRONMENTAL AGREEMENTS

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**‘On the spot’ fines & fiscal sanctions:** Can be particularly effective but open to challenge and collecting fines/sanctions can be problematic and require significant resources.

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**Administrative Sanctions /‘Penalty Points’** – Useful as a method of enforcing licences/permits whilst avoiding Court appearances but can be problematic to implement and impose a significant administrative burden. Susceptible to challenge if fair procedures/due process is not followed.

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**Publication of Offenders:** Can be effective but essentially a supplement not a replacement of traditional regulatory measures and may not deter all offenders.

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**Compensation Funds:** Requires offenders to pay into a compensation fund (either specific or general) which is then used to rectify environmental damage. Implementation is legally problematic in context of existing legal system.

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## INNOVIATE REGULATORY TOOLS

The traditional “command and control” model of regulation/enforcement is well established and it will not and cannot be easily displaced as it is ingrained within the wider legal system within which environmental law operates.

Obtaining sufficient resources to implement the traditional enforcement system will probably always be an issue.

There is an increasing awareness of the limits of the traditional model of regulation and enforcement which has resulted in a trend towards alternative forms of environmental regulation/enforcement which in many cases are more flexible and effective.

This trend should be **cautiously** embraced and the effectiveness of such alternative/innovative measures must be carefully evaluated to ensure they are not in effect a mechanism to evade regulation

It is not a binary choice the traditional and new models can and should be operated in a complimentary and mutually supportive manner !

## CONCLUSIONS

# ONE FINAL THOUGHT !

- What is the most effective method of securing enforcement of tax law ?
- Are there lessons in the context of enforcement of environmental law ?
- Legislation & traditional enforcement is not always the answer !

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