

The re-landscaping of the legal profession: Large law firms and professional re-regulation

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John Flood

University of Westminster, UK

Abstract

The size and scope of global law firms has made them difficult to encompass within a single regulatory jurisdiction. As the UK government sought to take control of the legal profession and market by removing self-regulation and introducing external regulation under the Legal Services Act, the large law firms were able to countermand the new regime. Through a combination of associations like CityUK, the City of London Law Society, as well as through individual firms, large law firms lobbied successfully to reinstate a new form of self-regulation known as AIR. The elites of the legal profession constructed a new logic of professionalism that accorded with the firms' ideologies and government's market-oriented objectives. Further attempts to consolidate their position at the EU and at the GATS levels are still in negotiation. Despite the legal market shifting to a more diffuse combination of actors, of which lawyers are only a segment, elite law firms have apparently strengthened their hold.

Keywords

authorized internal regulation, global professional services firms, professional regulation

Introduction

Large law firms have helped engineer the globalization movement in recent decades by providing the legal infrastructure for global capitalism (Beaverstock et al., 1999, 2000; Faulconbridge and Muzio, 2008; Flood, 1996; Morgan and Quack, 2006). In so doing they too have become global institutions and have created tensions in professional regulation with which they are now coming to terms (Silver, 2002–3). Regulation, or more precisely

Corresponding author:

John Flood, School of Law, University of Westminster, 4 Little Titchfield Street, London W1W 7UW, UK.

Email: john@johnflood.com

self-regulation, has long been identified as a core characteristic of professionalism as a distinct work organization principle (Freidson, 2001; Johnson, 1972; see Evetts, this issue). Recently professional regulation, de-regulation and re-regulation have become extremely topical concerns given the involvement of professionals and professional services firms in a number of high profile cases of corporate malpractice and their active role in some of the systemic risks of financialized capitalism.¹ Furthermore, recent legislative changes such as the UK Legal Services Act 2007 (LSA), the Australian Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (Mark and Cowdroy, 2004; Schneyer, 2009), and liberalizing proposals such as the Darrois Report (2009) in France and those by the Korea Development Institute (Koh et al., 2009) are paving the way for wide-ranging and unprecedented regulatory change at a global level, potentially leading to the development of new organizational forms, managerial structures and to the separation of ownership from control within professional work.

Such regulatory change follows on from the radical transformation of professional work itself and in particular from the emergence of the large often global professional services firm (GPSF), whose activities and practices pose a challenge to traditional professional regulatory regimes (Brock et al., 1999). At one level traditional regulatory regimes with their emphasis on individual practice and responsibility are ill equipped to deal with corporate cases of malpractice or with the systemic risks posed by these firms and their operations. The collapse and wind-up of Andersen Worldwide, the legal arm of Arthur Andersen, in the wake of Enron is a pertinent example (*The Lawyer*, 2007; Parnham, 2002). Similarly, existing regulatory frameworks can act as restrictions on the activities of these firms which require new structures and forms of organizing from what are permitted under traditional professional regulations. In this context, as illustrated by the large law firms under analysis in this article, GPSFs have acted both as an object and as an agent of re-regulation as new developments, such as the shift from individual to entity regulation, have been introduced to deal with the challenges posed by these new professional actors, while the firms themselves have lobbied national (Greenwood et al., 2002) and international regulators (Arnold, 2005; Quack, 2007; Suddaby et al., 2007) to introduce favourable changes to existing rules and regulations.

The contribution of this article is to review, within the context of the legal profession, how large GPSFs are undermining, modifying, escaping and ultimately reconstructing professional regulation regimes. Two examples serve here. The promotion of Authorized Internal Regulation (AIR) within the Hunt Report² is a classic case in point of this activity where a concept developed in the Smedley Review on large law firm regulation was transported across into a review of professional regulation generally and adopted as the generalized standard. AIR created a form of self-regulation or self-governance that was based on externally imposed, verifiable audit processes distilled from a substantive risk analysis of the law firm rather than the extant system that only deals with problems *after* they arise. What AIR achieved was the undermining of the move towards external regulation enshrined in the Legal Services Act, which following the perceived failure of self-regulation sought to impose stricter controls on the legal profession. The adoption of AIR enabled GPSFs to recapture self-regulation within the new ambit of external constraints. Another instance of the role of large firms in professional re-regulation is found in the way they have generally managed to sideline the inconvenience of conflicts of interest

rules while continuing to pay lip service to them (Griffiths-Baker, 2002), which has led to the regulator redrafting the rules to relax them (Dean, 2010).

These developments are not only extremely topical and empirically significant but they carry wider theoretical implications which are central to this monograph issue of *Current Sociology* as they provide clear examples of the reworking of traditional relationships between professional institutions and professional organizations. In particular they illustrate how professional organizations are participating in the reframing of the institutional and regulatory scaffolding which supports professionalism. These manoeuvres occur at a subtle level in that much of what happens is not explicit and takes place in informal settings. This makes events hard to capture as we are encountering the interaction of individual practitioners, employing firms and regulators.

In doing so, this article takes the following line. First, I provide a review of the literature on professional regulation and illustrate the increasing role played by large firms in this. Second, a brief outline of the field of large law firms is presented; and third, I examine the changing landscape of regulation as it affects the legal profession and large law firms, in particular from two perspectives: the UK and the transnational. Each is distinct and has different effects on the field.

Regulation, self-regulation and the professions

A wide ranging body of literature (Freidson, 1970, 2001; Johnson, 1972; Larson, 1977; Macdonald, 1995) has established the sociological distinctiveness of professionalism as a work organization method. Thus as famously put by Terry Johnson, professionalism is a 'peculiar type of occupational control rather than an expression of the inherent nature of particular occupations' (1972: 45). Crucial here is the control that professionals themselves, usually through their associations, exercise on their work, including its definition, organization, execution and evaluation. This, despite the empirical difficulties that such ideal-types pose, analytically distinguishes professionalism from alternative occupational principles such as managerialism or entrepreneurship where 'consumers in an open market or functionaries of a centrally planned and administered firm or state' (Freidson, 1994: 32), exercise such control.

Self-regulation is traditionally a key component of occupational control and a core objective for professional projects (Larson, 1977) as professions collectively seek to achieve and exercise a high level of 'institutional autonomy' (Evetts, 2002) in managing their own affairs. This includes regulating the production of producers, i.e. controlling who can practise as a professional and how one qualifies into a profession, and regulating the production by producers, i.e. that ensemble of rules and regulations which establish how qualified professionals practise and organize themselves and how professional services are 'produced, distributed and consumed' (Abel, 1988: 176). The regulation of the production by producers, the second pillar of professional self-regulation, is particularly important here as it provides that nexus of restrictive arrangements, regulations and deontological obligations that frame professional life.

Overall professional self-regulation has been seen as part of a broader regulative bargain where the state has granted professions a high degree of autonomy in organizing their own affairs in exchange for the professions' pledge to guarantee quality and put public

interest before their own. This for years has provided a stable template for professional governance. However, from the 1980s onwards professional monopolies and regulatory arrangements came under increasing scrutiny from neoliberal administrations throughout the world (Ackroyd and Muzio, 2005). In the UK, in particular, two parallel processes have been at play. Anti-monopoly sentiment had been growing putting professions in the firing line. Their restrictive practices when subject to economic analysis by the competition authorities failed to stand up for lack of convincing evidence (OFT, 2001; Terry, 2009), lending some credibility to long-standing charges of ‘conspiracy against laity’. In addition, the rise in consumerism, fostered by government policies and emboldened by some high profile cases of professional malpractice, gave voice to a massive number of complaints against lawyers and other professionals (Abel, 2003; Flood, 2008). In this context professional monopolies and restrictive arrangements were targeted in processes of liberalization and de-regulation while professionals themselves came under increasing public demand for more auditing and accountability (see Evetts, this issue).

Parallel to changing priorities in the political economy, wide-ranging transformations in professional practice and its organization implied that the traditional regulatory framework was increasingly obsolete. In particular the rise of the large GPSF means that most professional work takes place in organizational contexts and is influenced by organizational practices and strategies, yet in many instances individual practitioners continue to be the main object of professional regulation. Similarly, the increasing scale, complexity and geographical reach of these large firms put them beyond the reach of effective national regulation. However, most of the literature on professional regulation originates from an era when small-scale domestic practice was the norm and focuses on the occupational level and on the role of the national professional association and related institutions (see Maute, 2010).³

A more recent body of knowledge (Arnold, 2005; Cooper and Robson, 2006; Suddaby et al., 2007, 2008) has emphasized the increasing role of professional organizations as sites and sources of professional regulation (see Kipping and Mueller et al., this issue). Two areas are particularly illustrative of the GPSF’s regulatory role. One is the increasing role played by these firms in regulating, forming and even producing the professional identities of the practitioners they employ (Anderson-Gough et al., 1998, 2001; Covaleski et al., 1998; Grey, 1994, 1998). Firms in particular engage in a significant amount of ‘identity work’ (Faulconbridge et al., forthcoming; Thornborrow and Brown, 2009) as they seek to inculcate appropriate skill-sets and mind-sets in their employees. This in particular features the use of a bundle of increasingly sophisticated HR practices such as selective recruitment, in-house training, performance appraisal and mentoring to mould their recruits into effective corporate professionals; a process which involves the socialization into new priorities such as client focus, commercial awareness, team work and efficiency. A particularly good example here is the substitution by large law firms of the generalist Legal Practice Course (LPC) with bespoke firm-specific programmes which seek to introduce at an early stage new recruits to the firm’s own practices, ethos and culture (Malhotra et al., 2006). This identity work makes employing organizations such as the GPSFs in question important actors in the regulation of the production of and by professional producers insofar as they play an important role in shaping how individual practitioners come to understand and perform their role as professionals (Faulconbridge et al., forthcoming).

Second, there is increasing evidence of GPSFs acting as ‘institutional entrepreneurs’ seeking to challenge and change national and transnational regulations to suit their own particular activities and operations. For instance, Roy Suddaby and his colleagues (Greenwood et al., 2002; Suddaby et al., 2007) illustrate the active, but ultimately unsuccessful, attempts by large accounting firms to lobby professional regulators over radical changes such as the introduction of multidisciplinary practices and the XYZ designation, a transnational multidisciplinary elite qualification for business professionals. Even more remarkable is perhaps the attempt by large accountancy firms to use World Trade Organization (WTO) treaty provisions (Article VI:4) to challenge national restrictions, stimulate trade and competition in professional services and generally develop global markets for their expertise (Arnold, 2005). In this context, professional services firms have been portrayed in the literature (Arnold, 2005; Suddaby et al., 2007) as active components and beneficiaries of the Washington consensus driving forward processes of liberalization, de-regulation and globalization. And it is not only accountants that have been implicated in the process. Lawyers too are active in developing institutions, such as central banks and capital markets (Burki and Perry, 1998; Serra and Stiglitz, 2008). Thus the literature recognizes GPSFs as an increasingly important actor within the design, reform and operation of professional regulation regimes, prompting Suddaby et al. (2007: 334) to conclude that ‘the historical regulatory bargain between professional associations and nation states is being superseded by a new compact between conglomerate professional firms and transnational trade organizations’.

Thus GPSFs are re-articulating through the challenges they pose and through their own direct participation in the process of de-regulation and re-regulation the professional regulatory framework which had traditionally been located at the occupational and national level. While there is a quickly growing body of literature focusing on international accountancy firms, the same attention has not been given to law firms (cf. Terry, 2010). The reason for the distinction between law and accounting here is found in the nature of law itself. Public and private law are the means by which the state arranges relationships in the economy and in society (Weber, 1978: 314, 642) and lawyers are both the agents of those processes and their intermediaries. In other words, the rule of law; and from a sociological perspective law is inherently local and nation-based, with the exception of a limited range of public international law connected with the United Nations (Gessner, 2009). Law and lawyers are therefore aligned closely with the concept of the state and its jurisdiction.

However, contemporary global capitalism has been predicated on the rule of law, inherent in the Washington consensus, and among its chief architects are the large international law firms (Flood, 2007; Goff, 2007; Trubek et al., 1994). They have exported patterns of Anglo-American law (Flood, 2002) and have also been at the forefront of creating a global law (Gessner, 2009; Goff, 2007).

The field of large law firms

Global professional service firms employ 6.2 million people and generated annual fees of US\$764 billion according to the Managing Partners Forum (MPF, 2009a). They are a significant force in global capitalism. In law an elite of large firms dominates the 21st-century legal profession. According to International Financial Services London, legal

services, as a whole, contributed £16.6 billion or 1.4 percent of the UK's gross domestic product in 2006 while law firm exports totalled £2,970 million in 2007 (IFSL, 2009: 2). When taken to the global level, the Global 50 law firms earned revenues of over £55 billion in 2007–8 (IFSL, 2009). Of this UK law firms generated 20 percent while US firms brought in nearly 60 percent (IFSL, 2009). Nearly 40 percent of this revenue came from corporate and finance work while dispute resolution produced 28 percent (IFSL, 2009: 5). The largest global law firm, Baker and McKenzie, has 3900 lawyers with offices in 39 countries (www.bakermckenzie.com). And the next 15 firms have over 1400 lawyers each and their revenues exceed US\$1 billion each (IFSL, 2009: 7). In comparison with the Big Four accounting firms they are smaller in size yet in revenues they do not lag far behind (MPF, 2009a), but their respective labour demands are so dissimilar that we are dealing with qualitatively different entities (see Brock and Powell, 2005).⁴

There is nothing unusual in the domination of elites, but the scale and size of these law firms outstrips their predecessors. The structure of large law firms is simple: they are composed of two elements: partners and associates (Galanter and Palay, 1991). Although these elements are decomposed into subcategories, the main distinction is between owner and worker (Hagan and Kay, 2003). This has become abundantly clear during the financial crisis as City law firms reported drops in revenue but posted increases in profits per partner, which indicated that many of the layoffs of staff during the last two years were to preserve partners' earnings (Byrne, 2010). Indeed, the bargain that obtained between associates and partners – a true tournament for partnership – has now all but been destroyed as partners culled their associates and junior partners in the recession (Galanter and Henderson, 2008; Oyer and Schaefer, 2010).⁵

During the last two decades large law firms have become increasingly corporatized with the inclusion of human resources, marketing, risk analysis and compliance counsel, finance and technology departments. In addition, they have adopted departmental structures each with their own hierarchies, so that, for example, global litigation or real estate will have their own managing partners. Law firms have also become major educators, both in-house and through partner organizations in the case of the LPC (Faulconbridge et al., forthcoming). The scale of potential conflicts of interests in a globalized world has meant that law firms have had to invest in systems to apprehend potential conflicts. Globalization has also had effects on the governance of law firms. Traditionally organized as partnerships, many have opted to become limited liability partnerships (LLP) in 2000, with some adopting Swiss *verein* structures to enable local partnerships to coexist without regulatory strain. The adoption of LLP status was welcomed by GPSFs as it gave them de facto corporate status separate from their members: it recognized the organization rather than the individuals. Many of these aspects of practice are articulated and discussed through forums such as the Managing Partners Forum (www.mpfglobal.com), which provides a platform for social networking for elite professional managers.

Furthermore, their role in the production and interpretation of corporate law has made global law firms indispensable to government, finance and business. In the transnational sphere they are key players in the private ordering of cross-border transactions, e.g. joint ventures, capital markets and mergers and acquisitions (Flood and Sosa, 2008). With their expertise and knowledge they knit together different legal jurisdictions into seamless structures that configure complex corporate transactions.

Thus, large transnational law firms are a distinct segment within the legal profession possessing power, authority and wealth, one which has outgrown the reach of its own regulator (Brock et al., 2006; Faulconbridge and Muzio, 2008; Heinz et al., 2001; Smedley, 2009).

The new regulation of the legal profession

The rise of the global legal law firm has meant it has become a significant institution in the construction of the global legal regulatory field. On the one hand, regulation of lawyers and legal professions is balkanized with the US, fragmented along state lines, at one extreme and the UK, almost unitary, at the other.⁶ In part this is the result of a dominance of small firm lawyers in the constituent assemblies of bar associations around the world. Thus the American Bar Association (ABA), although it engages in global dialogue, is unable to enact measures that would liberalize professional practice because its House of Delegates usually votes against such measures: for example, it voted against the introduction of multidisciplinary practices in 2000 (Terry, 2002). The US legal profession is also hampered by the courts' and states' intrusive roles in regulating lawyers (Wolfram, 1999), which Hadfield (2008) and Davis (2010) see as active barriers to the potential global reach of US lawyers compared to the less restrictive regulation of the UK profession. We see this type of restrictive engagement in force in a number of jurisdictions in the world, e.g. India, Italy, China.

For the large law firms, however, their regulatory burden is of a different kind. Global law firms are less involved in activities that fall into reserved categories and therefore do not find themselves hampered as much by local rules as do those who practise local law.⁷ These reserved activities, a result of tradition, tend to include areas such as probate, property transfers and the conduct of litigation, which affect individuals more than corporations. Large law firms use a number of strategies to avoid local regulatory problems including the use of 'best friend' law firms, localized offices in franchise relationships, or formalized network alliances (Mayson, 2008) and even offshoring work. Large law firm consumers are, however, sophisticated, knowledgeable corporate clients who do not perceive themselves under a yoke of monopoly restraint. Indeed, Smedley (2009) strongly insisted that corporate consumers rarely used regulation as a grievance procedure preferring to negotiate directly with GPSFs or use litigation.

In order to understand the regulatory world of global law firms it is useful to divide it into two areas: the UK and the transnational. To follow Laurel Terry, it is important to understand that regulation arises in different contexts here, but often there is a common thread which runs through these debates. The UK regulatory debate has revolved around consumer choice and market expansion; whereas EU discussions focus on free movement of professionals; and GATS is concerned with the liberalization of trade in services and the removal of barriers. What is also clear is that these debates do not take full cognizance of each other. They occasionally become conscious of each other but frequently miss. This lack of discursive connection is not surprising since the institutional structures of these debates are cognitively different, they do not necessarily reference each other, and different persons and organizations are accountable for their management. For example, UK trade representatives, as in the US, are not necessarily *au fait* with the

intricacies of domestic legal regulation unless they directly impinge on the negotiations at hand (cf. Terry, 2010); and domestic regulators rarely participate in transnational regulation. It is worth reiterating two points made by Suddaby et al. (2007: 338) here that the actors engaged in regulatory debates have been professional associations and government officials; and that the logic of 'professional governance' is based on trusteeship and ethics over economic gain, yet we are beginning to see an emergence of the GPSF as an institutional player in its own right. These roles are played out at domestic and global levels as the following sections show.

The UK domestic regulatory schema

The thrust of the regulatory reform in the UK has been directed at smaller law firms from which the majority of the legal complaints derived. Following a chain of developments from competition investigations through to consumer complaint studies, government thrust itself into the regulation of legal services, first via the Clementi Review then through the Legal Services Act 2007. The LSA is central to understanding the regulatory matrix in the UK. The Act introduced two new features to the legal landscape. One, a new system of regulation with an oversight regulator, the Legal Services Board, which would monitor a series of frontline regulators, e.g. the Solicitors' Regulation Authority (SRA) and the Bar Standards Board. The other feature permitted non-lawyers to invest in and own law firms so that law firms would not have to be organized solely as partnerships. Large law firms were considered to be among the beneficiaries of this particular move since it would help them attract external investment for overseas expansion, IT investment and for possible flotations on the stock market. Following the LSA the Law Society set up two parallel reviews – Hunt and Smedley⁸ – to determine the operation of the new regulatory structure among solicitors, the largest segment of the legal profession.

The main lobbying and negotiating group for the large law firms, the City of London Law Society (CLLS), as distinct from the Law Society, is small – 57 members – but powerful and effective and played an active role in the re-regulation process.⁹ Although the CLLS started life as a City livery company, founded in 1908, it separated in 2007 from the company to become a formal representative body for City solicitors and firms. This change gave it the necessary status to become involved in the debates around the LSA and it was invited to give evidence to the Ministry of Justice and the joint parliamentary committee reviewing the Legal Services Bill (McIntosh, 2007: 8).

Large law firms, even though different from small firms by client and practice, were nevertheless swept up into the regulatory maelstrom as it traversed from the Clementi Review to the LSA. The CLLS was unable to influence significantly the formation of the Legal Services Bill as it wished, despite intense lobbying from itself and its members – although ultimately the final statute was closer to their aims in that large law firms would not be over-regulated.¹⁰ It was able to reinforce the argument that the Lord Chancellor would have to consult the Lord Chief Justice on appointments to the Legal Services Board, which was a minor, inconsequential nod to independence. More importantly, the CLLS argued strongly that the 'corporate consumer', as a distinct entity, should be represented on the Consumer Panel of the Legal Services Board (CLLS, 2007) but the government refused to include them as it was reluctant to include in-house lawyers on the

panel in case its independence was compromised (House of Commons Library, 2007: 20). The result was that the CLLS focused its energies on the subsequent regulatory reviews: Smedley and Hunt.

Government and the professional regulators had admitted that rules-based regulation had effectively failed as the rising tide of complaints against lawyers revealed. To prevent lawyers from avoiding rules a principles-based form of regulation would replace the old system and moreover it would take account of the organizational context of professional work by making the firm, rather than the individual lawyer, the primary unit of regulation. In its evidence to Lord Hunt's – who also chaired the Joint Committee on the Draft Legal Services Bill – *Review of the Regulation of Legal Services* (Hunt, 2009), the CLLS argued that large law firms were qualitatively different from the mass of the legal profession:

We suggest that your review of regulation, like regulation itself, should not be done on a 'one size fits all' basis. . . . [A] number of objectives of regulation, as articulated by Clementi and which found their way in an extended form into the LSA, are not relevant to the practices of firms represented by committee . . . nor, therefore, to the way in which those firms should be regulated. These objectives are improving access to justice, protecting and promoting the interests of consumers . . . and increasing public understanding of the citizen's rights and duties . . . we do not believe they should have a bearing on the regulations that Corporate Work firms are subject to. (CLLS, 2009)

Although they have outgrown their 'regulatory boundaries', law firms are still bound by the essential feature which distinguishes law from other professional services: privileged communication between lawyer and client, regardless of whether the service is a reserved one or not.¹¹ It is at these boundaries we discern some of the problems on the limits of the reach of domestic regulation. For example, under the LSA the frontline regulator, the SRA, had to devise rules on frameworks of practice and one question was: should the rules apply equally to all lawyers in an international law firm regardless of where they were located? The CLLS commented that global law firms because of their complexity did not fit the SRA's idealized picture of a typical law firm:

Determining which rules are applicable to regulated entities themselves, which apply to their managers and which the non-lawyers and employees within those entities are subject to, is not straightforward. For the sophisticated business structures required to be adopted by many City firms to deal with their international operations the difference in application of the rules to overseas branches as contrasted to controlled separate entities and the lawyers and non-lawyers practising through them are also often difficult to understand. (CLLS, 2008)

The CLLS further argued, in effect pointing out the regulator's ignorance of the very institutions for which it was meant to hold to account, that:

There are also uncertainties in this definition surrounding the term 'national group of lawyers' as applied to an international firm in which there are many different nationalities who have multiple legal qualifications, many of which are unrelated to their individual nationalities. We suggest referring instead to a 'group of lawyers by primary practising qualification (wherever located)'. (CLLS, 2008)

The key issue here was how would an international firm be regulated: by the SRA or other countries' regulators? The CLLS (2008) held that the SRA had missed the point by distinguishing among lawyers on grounds of nationality but the SRA failed to be persuaded.

Although the CLLS claimed (Perrin, 2009) not to be the progenitor of the Smedley *Review of the Regulation of Corporate Legal Work* (2009), law firms were active in persuading the Law Society to commission the Smedley Review in order to examine the regulatory structures of corporate law firms. The justification for the review was the lack of trust between the large law firms and the SRA, as well as between the Law Society and the SRA. The Law Society divested itself of the SRA in 2007 following the Clementi Report (2004). But the two organizations struggled over who would control the SRA, via funding and appointments to its board. Clementi and the LSA became justifications for a putsch against the SRA and Smedley and Hunt were the forces deployed.¹²

The problem with the SRA was that it had a 'small-firm' mentality of the legal profession and that it used the same approach to all firms.¹³ From this perspective the CLLS believed that the SRA could not possess the necessary skills to regulate large, international law firms. For example, each new piece of business required a 'client care letter', originally designed for one-shot clients, which the large law firms said was an expensive redundancy for their clients who were knowledgeable. Others argued that the SRA was concerned only with book-keeping errors in firms. Some large law firms lobbied for a separate regulator, preferably based in London and conversant with their operations; the CLLS favoured a separate unit within the SRA.¹⁴ Smedley, although he agreed with the criticisms, finally rejected the new regulator option preferring an in-house group within the SRA that could deal exclusively with large law firms which because of their size would and could initiate sophisticated compliance and risk systems.¹⁵ The idea of unified regulation was not easily abandoned. Large law firms as significant and powerful players were vastly outnumbered by smaller law firms, hence they never could escape being embraced by the legal profession regulatory remit.

The scope of regulation as it affects the large law firms is still unclear. But both the Smedley Review and the Hunt Review advocate a return to an era of enlightened and disciplined self-regulation for large law firms. They derived their model of regulation from that employed by the Financial Services Authority (FSA) – principles-based regulation. This relied on a system of internal audit that would inform management and let it respond quickly to 'business and operational risks' (Tiner, 2005). Hunt decided to go further than Smedley and attempt to cascade the enlightened version of self-regulation (self-governance) throughout the entire profession. He adhered to the idea of a unified profession despite its differences. In fact, Hunt went so far as to say: 'I regard many aspects of the debate between the regulation of "City" firms and "others" as fundamentally sterile' (2009: 70). Smedley's constituency was the City law firms, whereas Hunt's audience was perceived as all solicitors, the entire profession. He received criticism of Smedley for its narrow parochialism and that it should have considered all corporate law firms. These criticisms were echoed by the Legal Services Board and the Law Society. It was not that they disliked Smedley's recommendations, which they saw as special pleading for a particular segment of the legal profession, but they wanted them to be spread wider throughout the profession and noted that they would have to refer to apply organizational forms such as the alternative business structures (ABS) contemplated by the LSA when these came into existence.

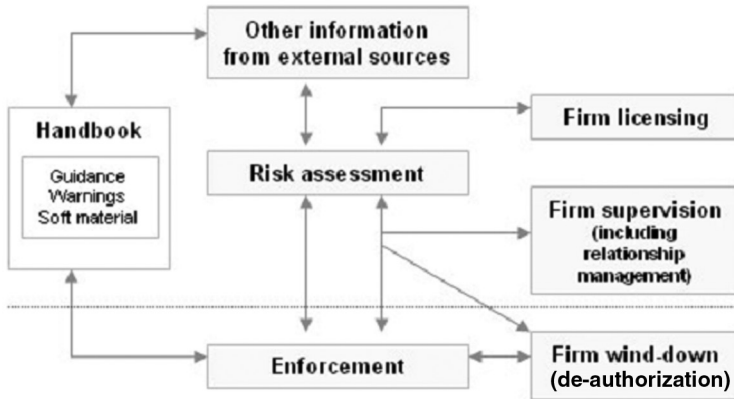


Figure 1. The SRA regulatory framework (SRA, 2010).

Hunt therefore advocated an institutional approach to regulation that would be ‘principles-based’ and founded on best practice in the profession. Even though he rejected many of the arguments of large law firms about the sophistication of their clients and their capacity to exercise self-governance, he finally drilled down to basic distinctions which comprised ‘the size and capacity of firms and the extent of their compliance arrangements’ (Hunt, 2009: 71). Hunt was also worried about regulatory capture of sectional regulators by the large law firms. His solution was to propose a system based on the Australian model of audits combined with subsequent self-audits, which resonated with the approach of the FSA. However, this was not meant to be an escape route for the large law firms: ‘I should like to see it begin at the “top end” of the profession, but high standards of governance and self-regulation should be the aspiration of every firm. They should be rolled out across the profession’ (Hunt, 2009: 75–6).

For this to occur the SRA ‘should instigate a system of Authorised Internal Regulation (AIR), which firms would be allowed to adopt if the regulator believes their risk, compliance and governance processes are sufficiently sophisticated and robust’ (Hunt, 2009: 9). In effect, regulation would be subcontracted to the firm. For the large law firm AIR vindicated what they already did informally and it released them from considerable intrusive levels of petty record-keeping that focused on the individual rather than the firm. And since they received few complaints, AIR gave them the opportunity to legitimate their internal systems of organizational self-governance at a professional level so they could become models for the entire profession. Moreover, AIR would apply to alternative business structure legal service providers – the unknown quantity – when they entered the market. Large law firms welcomed this move and saw it as a vindication of their distinction, but they would have to convince the SRA to implement it in a ‘friendly’ way. The SRA more or less adopted the ideas in the reviews and committed itself to ‘outcomes-focused regulation’ that would be arm’s-length and would be a ‘risk-based regulatory regime based on core principles and the high-level outcomes firms must achieve’ (Gibb, 2010; see also Black and Baldwin, 2010). This will require firms to put in place robust compliance procedures to cope with risk. The approach of the SRA is shown in Figure 1 which expresses the

relationship firms will have with the SRA (2010: 6): it moves away from micro-management and instead empowers firms to identify risks and their management.¹⁶

The SRA method requires a three-stage approach inasmuch as law firms provide information on the firm to the SRA; the SRA inspects the firm and makes a risk assessment; and following these stages the firm supplies data to the SRA on risk and compliance on a regular basis. For the large firms, this was a good solution yet they found cause to complain about the proposed structure as the response of the CLLS shows:

We believe that a new code will not of itself move regulation in the direction you and our members wish unless there are similarly radical changes in the culture, expertise and practices of the regulator which reflect the new approach, in particular amongst those charged with the tasks of supervision and enforcement. . . . We are anxious to ensure that our members' attempts to help you move forward are valued and reflected in your work. . . . With this in mind, we would invite you to meet representatives of our members to discuss your ideas and ours before setting out on the task of preparing any document which attempts to codify the principles, evidence of compliance and guidance. There have been occasions in the past when we have felt that our responses to consultations have not been reflected in the final outcome, and we have been given little or no explanation as to why our carefully considered points have not been adopted.¹⁷

The relationship between the large law firms and the SRA, even with the new chairman, remain fraught. With doubts over the future code, the large law firms felt that the SRA had not taken Hunt to heart, but despite these complaints the arguments of the large law firms have been persuasive in the post-LSA era. The LSA has provided them with the freedom to organize their practices in whatever form they wished – partnership, corporation, holding company, or ABS (MPF, 2009b) – and the result is a paradoxical one in that by being brought fully into the unified regulatory system they have been virtually freed from external regulatory control within the UK.

The transnational regulatory schema

The one area which Smedley, Hunt and regulators shied away from was the international dimension of regulation for multinational law firms, even though large firms pitched their case on their international reach. The 'double deontology' problem whereby law firms have to comply with their headquarters' regulatory system and that of the host country where overseas offices are based creates a need for regulation that transcends borders. This comes about because of the nascent state of global law, and its regulation has not yet reached maturity so the necessary institutions are still to be created (Goff, 2007). The result is that individual lawyers inside these firms do not think about cross-border ethical issues because of their complexity and the pressures of their work: this has become the remit of firms' general counsel – e.g. Allen and Overy has 15 general counsel – who deal with rules and general compliance (Denyer, 2010; Parker, 1999: 184). The role of general counsel is not just reactive in responding to problems as they arise; they now continuously engage with country regulators to discuss solutions to differing attitudes to dilemmas on confidentiality and conflicts of interest, among others. Moreover, problems are not always dependent on the location of the firm's offices.

For example, India precludes foreign law firms from practising locally but nonetheless foreign lawyers are working in India on a regular basis so creating regulatory questions that the large law firms have to discuss with Indian legal regulators.¹⁸ These firm–regulator dialogues occur separately from bar association level discussions.

Global regulation is moving towards a broader sense of resolution. The EU has been dealing with the problem of mutual recognition and freedom of movement of professionals from 1977 onwards (Lee, 2010). GPSFs operate across EU boundaries by virtue of their corporate practices which hardly impinge on local law interests, e.g. transactional work vs advocacy.¹⁹ And firms have benefited greatly from various directives on legal services, establishment and mutual recognition of diplomas which allow lawyers to practise in other states (Lee, 2010).

Partial attempts by the Council of Bars and Law Societies of Europe (CCBE) and the International Bar Association (IBA) to create model cross-border codes of conduct for lawyers (e.g. CCBE, 2008; IBA, 1998) adhere to conservative modes of thinking that place the individual lawyer at the centre with little reference to the law firm as the organizationally relevant unit. Accordingly, large law firms and the CCBE enjoy an uneasy relationship. There have been attempts by the CCBE to engage its member bar associations in a dialogue with international law firms. In 2004 Hans-Jürgen Hellwig, then president of the CCBE and senior lawyer in Hengeler Mueller, a large German law firm, wrote a letter to the heads of the EU bar associations urging them to engage in dialogue with international law firms or there would be a danger of the legal profession bifurcating in Europe. Hellwig insisted that it was not the role of the CCBE to engage directly with the international law firms as this would breach the principle of subsidiarity in respect of bar associations' relationships to their own members. The reaction of the large law firms was anger as they felt slighted by the letter, nor did bar associations seem to take it seriously. There was no follow-up to the appeal and so it petered out. The CCBE's general stance has been to protect the privileges of lawyers against encroachment, again very much biased to individuals rather than the firm. The CCBE eventually set up a large law firm group but it sits uneasily within its structure as it represents bar associations rather than interest groups. We can see further underpinning of this view in the CCBE's clear dismay at the Legal Services Board's introduction of alternative business structures.²⁰ The result is that neither the associations nor the firms themselves have been able to push the EU towards a coherent view of the profession. The big law firms have, however, largely ignored the debate.

There are, however, links between EU moves and those at the transnational level. With the stalling of the Doha Development Round of talks, the EU has shifted away from global solutions to a series of bilateral agreements on services, now numbering 11 (Goldsmith, 2010). At the level of GATS, the approach to regulatory matters has been similarly fragmented and lacking the coordination given to it by the Big Four accounting firms (Arnold, 2005; Suddaby et al., 2007). GATS and WTO negotiations are well documented by Arnold (2005) and Terry (2010) so they are omitted here. The GATS negotiations have embraced a number of lawyers' organizations, usually uncoordinated and inconsistently, including the CLLS, the Law Society, the IBA, the ABA, the CCBE and the International Union of Lawyers, among others (see WTO, 1998: 19). Terry (2008a, 2010) points out that many lawyers' associations have not truly understood the

ramifications of the GATS. It pursues a 'neoliberal deregulatory agenda' (Arnold, 2005: 303) which is often at odds with the ethos of professionalism. Much of the lawyers' bemusement and frustration is based on cultural misunderstandings of the mode of discourse used by trade negotiators. Terry reports that an IBA representative at a WTO meeting claimed that 'lawyers are unique' and that:

. . . the response . . . heard back was that all groups think they are unique and – implicitly – that it would be impracticable to have separate accommodations for all of the groups that think they are unique. (Terry, 2010: 971)

What has been surprising in the negotiations is the lack of a clear, identifiable large law firm presence unlike that of the accounting firms (Arnold, 2005): the task has been left to representative trade organizations.²¹ Although the large law firms are conspicuous by their institutional absence, their members are vigorous in their activities in these forums and international regulatory activities. Both the MPF and CityUK (successor to the IFLS), for example, are headed by senior partners of large law firms, who take political roles influencing policy-makers and allying themselves with business and finance. For example, CityUK is a member of the European Services Forum which is involved in both GATS negotiations and those for EU bilateral agreements (www.esf.be). CityUK is also part of the Global Services Coalition (GSC), which lobbies groups like the G-20 to refrain from introducing new trade barriers against WTO principles (GSC, 2010). Moreover, it was the senior partner of Clifford Chance, the head of CityUK – after discussions with Allen and Overy and Herbert Smith – who accompanied two prime ministers on trade missions to India and China in attempts to persuade the Indian government to open up the Indian legal market to foreign law firms (Ganz, 2010b; Rayner, 2010; Stanley, 2008).

Laurel Terry (2008a) has described a set of movements that subscribe to a common core: the inclusion of lawyers as one of a set of 'service providers'. This approach has been adopted by NAFTA, GATS and various US bilateral free trade agreements. What is not clear is the unit of analysis in service providers – the individual lawyer, the law firm, or the legal profession? Given that the firm is rarely mentioned, it appears either individual lawyers or the profession may be dominant. In fact the key player is likely to be the profession since the individual is subsumed within the profession and Terry further argues that, in the globalized world, the individual is under threat and unauthorized practice of law (UPL) rules will not suffice to protect (Terry, 2008b). For example, strict UPL rules in the US are being criticized by the Department of Justice and Federal Trade Commission. These are powerful challenges to the orthodoxy of professionalism and mark the shift from ethics to regulation as a fundamental change in the ethos of professionalism (Suddaby et al., 2007). The question remains as to whether the WTO has had an effect on the practice of law. Developments such as the outsourcing and offshoring of legal work and the gathering pressures on conflicts of interest rules in the UK and the US would suggest that its influence is being felt, but individual regulators have yet to acknowledge this (Silver and Daly, 2007). For large law firms the WTO should be a benign influence as it has the potential to open up markets for them. As Terry (2008a, 2010) shows, there are forces that are challenging the perception of restrictive practices that prohibit the free flow of legal services but few exist despite 'baby steps'²² that are impelling the legal profession towards

the establishment of a transnational regulator. Indeed, such an institution would be anathema to the profession and to state governments.

Conclusion

Viewing these arenas of regulatory contestation it is apparent that GPSFs have been successful in reshaping the regulatory landscape. Law firms, although not as visibly present as the accounting firms, nevertheless have brought their skills and networks to bear in order to liberalize the profession. They have been able to gain this by exploiting the gap between the interests of the mass of lawyers in the profession and the corporate law firms and by relying on the fragmentation of the legal profession at the national level as demonstrated in the EU and global arenas. The lack of coordination among the actors at the domestic, regional and global levels has created a space for GPSFs to pursue their own agenda.

Large law firms have been able to arrogate power to themselves. Under the LSA they will have escaped considerable, though not all, regulatory oversight with a renewed emphasis placed on their own self-regulation.²³ In this respect, large law firms have won not so much a turf battle but a class war within the profession (Arnold, 2005; Dezalay, 1995; see also Abbott, 1988). The limits on lawyering both within and without national boundaries are falling step by step. In the area of training the large law firms have succeeded through bespoke LPCs and in-house training. They have persuaded the SRA that Qualified Lawyers Transfer Regulations should not prevent the lateral transfer of lawyers into the English profession because of potentially infringing the GATS rules. And the registration of foreign lawyers' rules has simplified the procedure at the most basic level. In addition, they have persuaded the SRA that restrictions on conflicts of interests for sophisticated clients should be relaxed. Moreover, their use of outsourcing of back office and routinized legal work to countries such as India and the Philippines has dissipated the effects of regulatory strictures in home countries.

In the EU and global arenas the large law firms have succeeded in distinguishing corporate counselling work from the traditional reserved activities of lawyers. This has a double edge to it in that they remain part of the legal profession as lawyers but they have managed to acquire a distinct professional identity by appearing to divorce their activities from those of the mainstream.

What of their relationship to professional associations? Here the large law firms have taken another dual approach. They have worked closely with the professional bodies and assisted in driving forward the negotiations to liberalize restrictions on transnational practice. Indeed, engagement with the GATS has enabled GPSFs to attack, through their associations, the restrictive policies of markets they aspire to enter, e.g. Brazil (Ring, 2010) and India. Where they have been able to forge a common cause appealing to professional values and interests, they have committed themselves to working in tandem with professional bodies. But where these same bodies appear to diverge from the interests of the large firms, they have resorted to their own intra-organizational bodies (e.g. MPF) or forged alliances with government through commercial organizations such as CityUK and the European Services Forum (ESF). Thus, their deployment of professional values (e.g. public interest) and associations (e.g. the Law Society) strikes us as instrumental and utilitarian even though they articulate the rhetoric of professionalism. They

have been able to play with both soft and hard forms of power (Lukes, 2005) and engage in discourses at national and international levels with ease. At this level we see the renegotiation of 'the historical regulatory bargain between professional associations and nation states' referred to by Suddaby et al. (2007) to one where GPSFs are pursuing their own agendas through their own channels. They have created multiple identities that operate simultaneously for them and that exploit the tensions and gaps in institutional logics and enable them to build new alliances with the global order. Large law firms have, by making the organization the salient unit, shifted away from traditional logics based around notions of public interest and asymmetrical relationships and supplanted them with the logic of the market (Suddaby et al., 2007; see also Johnson, 1972; Maister, 1997). In doing so, they have created a new professional ethos.

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Notes

1. The Takeover Panel's recent criticism, for example, of the Kraft takeover of Cadbury included a mild rebuke for Lazard, its financial adviser, and potentially by implication the legal adviser, Clifford Chance, demonstrates the difficulty of situating the fulcrum point between restrictive regulation and business freedom (Takeover Panel, 2010).
2. Lord Hunt of Wirral was commissioned by the Law Society in the wake of the Legal Services Act to review how modern regulation should actually operate within the legal profession. See below for more detailed discussion of these reports.
3. Maute (2010) thoroughly outlines the regulatory failings that took place among lawyers both in Australia and the UK that led to the legislative changes in both countries.
4. By way of comparison in the MPF Global 500 the largest GPSF by headcount is IBM Business Services with over 398,000 staff; and the largest by fees/turnover is PricewaterhouseCoopers at US\$28,185,000,000. The biggest law firms (at below No. 60 in the list) number 2000+ staff and fees/turnover does not rise above US\$2 billion (MPF, 2009a).
5. American Lawyer has also created the 'Layoff List' which has counted all the redundancies made by corporate law firms; at: www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202425647706&slreturn=1&hbxlogin=1.
6. The following example, however, shows how regulation can become internally disconnected: the Law Society is responsible for over 500 multinational partnerships and 4000 solicitors practising outside UK borders. This means the Law Society is by default a global regulator, but not necessarily a role it identifies with or understands. These observations tell us that there are collective strategies at play as well as individual initiatives by firms in the regulatory sphere.
7. Despite their global profile we still find many large law firm lawyers debating the minutiae of domestic regulations as evidenced by the discussions running on the ABA Commission on Ethics 20/20 discussion boards at www.abanet.org/ethics2020/aboutus.html. See Mayson (2010).
8. Nick Smedley was a former senior civil servant in the Ministry of Justice and Lord Hunt of Wirral is a former large law firm senior partner and minister in the Conservative government.

9. However, the CLLS occasionally doubts its influence. It feels that it is sometimes regarded as an individual player rather than a collective one, hence it urges its members to lobby individually as well as through it. We can see this ‘dual-lobbying’ occurring in the correlated CLLS and law firms’ responses to the Legal Services Bill (JCDLSB, 2006). The CLLS also now has six-monthly meetings with the SRA to discuss large law firm matters.
10. The CLLS formed its main lobbying body, the Professional Rules and Regulatory Committee, populated by law firm general counsel, in response to the Clementi Review and the Legal Services Bill. It also hired consultants who advised it to be more active in the regulatory marketplace.
11. Accountants have sought equivalent privileges but failed in their endeavour and also failed to strip lawyers of their attorney–client privilege (Segal, 1997). See also Chapter 5 of Joint Committee on the Draft Legal Services Bill, First Report; at: www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/23208.htm.
12. For further examples of attack on the SRA see Vizards Wyeth’s pamphlet on its difficulties; at: www.vizardswyeth.com/advantagesolicitor/documents/Solicitors_Regulation_Authority.pdf.
13. The CLLS was peeved that the chairman of the SRA was not conversant with the ways of the large law firms. He was eventually replaced by a former senior partner of one of the City’s large law firms (Rogerson, 2010). See also CLLS responses to the Smedley Review (www.citysolicitors.org.uk/FileServer.aspx?oID=498&IID=0) and to the Hunt Review (www.citysolicitors.org.uk/FileServer.aspx?oID=556&IID=0).
14. See, e.g. Allen and Overly, ‘The business of law: Are there better ways to regulate the legal profession?’; at: www.google.co.uk/url?sa=t&source=web&cd=4&ved=0CCMQFjAD&url=http%3A%2F%2Fwww.allenoverly.com%2FAOWeb%2Fbinaries%2F50768.PDF&ei=zfg6TOD7KJm60gTC25GADg&usq=AFQjCNEG6TEYw3FxiyeP3aTe9UAE57ONDw&sig2=EThcgvEBfmNGkyG2q13wyQ.
15. Smedley had a Reference Group to guide him which consisted of six large law firm partners and seven representatives of corporate clients in addition to a few Law Society officers (Smedley, 2009: 62).
16. Julia Black (2010) has argued that risk-based regulation creates as well as cures problems. It especially requires the regulator to take risks, something which their previous system avoided.
17. CLLS, ‘Response to SRA: Achieving the right outcomes’, 6 March 2010; at: www.citysolicitors.org.uk/FileServer.aspx?oID=763&IID=0. See also CLLS, ‘SRA consultation “The architecture of change: the SRA’s new Handbook”’, 20 August 2010; at: www.citysolicitors.org.uk/FileServer.aspx?oID=840&IID=0.
18. The kinds of regulatory issues that arise include Linklaters, a large law firm, being ordered by a Mumbai tax court to pay taxes on services provided by foreign lawyers, a ruling which affects all foreign law and accounting firms (Ganz, 2010a).
19. The WTO also adopts the distinction between advocate (reserved) and counsellor (open), thus favouring international law firms (WTO, 1998).
20. Letter to Legal Services Board from CCBE, 25 January 2010.
21. E.g. the listing of professional participants within the European Services Forum lists lawyers as represented by the Law Society and the CCBE, whereas accountants include at least two of the Big Four firms (www.esf.be).
22. See e.g. Conference of Chief Justices, Resolution 13: In Support of Cooperation Among United States and Australian Bar Admission and Lawyer Disciplinary Bodies; at: ccj.ncsc.dni.us/InternationalResolutions/resol13.html.
23. What is not discussed here but is enormously relevant is the role of insurance companies and banks in the regulation of law firms and GPSFs in general. Insurance companies exercise considerable control over law firms, for example, through their role in supplying professional

indemnity insurance. They are free to lay down many extra-curricular requirements not necessarily found in the normal scope of regulation. Banks through their loan facility arrangements with law firms are able to impose covenants that, for example, in the present recession have resulted in law firms laying off partners (based on interview with senior partner of global law firm, 2010).

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John Flood is Professor of Law and Sociology at the University of Westminster. He holds visiting professorships at Miami and Bremen. He is also a research adviser to the Legal Services Board. His research focuses on the legal profession and globalization of law. Details of this can be found on his website www.johnflood.com.

Résumé

En raison de la taille et du périmètre d'action des cabinets d'avocats mondiaux, il est difficile de les faire chapeauter par une seule juridiction réglementaire. Alors que le gouvernement britannique cherchait à contrôler la profession et le marché juridiques en supprimant l'autoréglementation et en introduisant une réglementation externe avec le Legal Services Act (Loi sur les services juridiques), les grands cabinets d'avocats purent annuler la nouvelle réglementation. Par le biais d'une combinaison d'associations comme CityUK, la City of London Law Society, ainsi que par celui de cabinets individuels, de grands cabinets d'avocats ont exercé des pressions et réussi à réintroduire une nouvelle forme d'autoréglementation connus sous le nom AIR. Les élites de la profession juridique ont élaboré une nouvelle logique de professionnalisme qui répondait aux idéologies des cabinets et aux objectifs orientés vers le marché du gouvernement. D'autres tentatives de consolidation de leur position aux niveaux de l'UE et de l'AGCS sont encore en cours de négociation. Malgré le glissement du cadre juridique vers une combinaison plus diffuse d'acteurs, dont les avocats ne sont qu'un segment, les grands cabinets d'avocats ont semble-t-il renforcé leur position.

Mots-clés

cabinets mondiaux de services professionnels, réglementation interne autorisée, réglementation professionnelle

Resúmen

El tamaño y alcance de los bufetes de abogados globales han hecho difícil que estos puedan integrarse dentro de una sola jurisdicción regulatoria. Conforme el gobierno británico buscaba tomar el control de la profesión legal y del mercado al deshacerse del sistema de auto-regulación y al introducir normas externas conforme a la ley de servicios legales (*Legal Services Act*), los grandes bufetes fueron capaces de anular el nuevo régimen. Gracias a la combinación de asociaciones como CityUK y la City of London Law Society, así como también a través de despachos jurídicos individuales, los grandes bufetes de abogados realizaron exitosas prácticas de lobby para reestablecer una nueva forma de auto-regulación conocida como AIR. La élite de la profesión legal desarrolló una nueva lógica de profesionalismo que sigue las ideologías de los bufetes y los objetivos del gobierno orientados al mercado. Aún siguen en negociaciones los intentos de los bufetes de consolidar su posición en la UE y en los niveles GATS. A pesar de que el mercado legal se está moviendo hacia una combinación más difusa de participantes, de los que los abogados sólo representan un segmento, los bufetes exclusivos han reforzado aparentemente su posición.

Palabras clave

empresas globales de servicios profesionales, regulación interna autorizada, regulación profesional