In general terms, the application of anti-hybrid rules proposed by the OECD in Action 1 of the BEPS Project, with the aim of establishing a tax between the tax treatment applicable to the remuneration derived from hybrid financial instruments in different jurisdictions, depend on the fulfillment of the four outlined conditions: (i) the use of a financial instrument by the taxpayer; (ii) the existence of an actual payment; (iii) an effective advantage in the tax treatment; characterized by the deduction of the payment in the source state without the taxation of the corresponding amount in the residence state; and (iv) the presence of a hybrid element as the cause for the conflict in the characterization of the payment item by different tax entities. 

In order to define the legal scope of the anti-hybrid rules, the OECD proposed an express definition of the term “payment,” which comprises “any economic benefit, including (but not limited to) a distribution, credit, debit, or social interest of money” that is made by a company residing in one jurisdiction and received by a company residing in a different jurisdiction with the aim of obtaining a tax benefit. However, the concept of “payment” is highly litigated, thus raising the critical issue of which payments could be considered a “payment” for anti-hybrid rules purposes, such as the Brazilian interest on net equity. This is especially important because it is debatable whether the interest on net equity should be included within the scope of anti-hybrid rules, in light of the right to deduct the payment from the taxable profits of Brazilian companies.

In fact, Brazilian interest on net equity is not an instrument whose economic considerations are straightforward due to its complex nature. It is a complex instrument that the Brazilian legislation allows to achieve the following three legal objectives: (i) to mitigate the effects of the distribution of equity interest; (ii) to reduce the tax burden; and (iii) to stimulate foreign direct investment. Nonetheless, it is important to point out that the Brazilian interest on net equity should be included within the scope of anti-hybrid rules not only due to its benefits for tax purposes, but also due to the tax treatment of foreign investors and the tax advantage to the company.

Moreover, as a policy standpoint, it is clear that the interest on net equity may be characterized as an exempt dividend from the perspective of the residence state (in this case, the interest is not considered as an exempt dividend from the perspective of the residence state). Therefore, the characterization of Brazilian interest on net equity as an exempt dividend in the residence state may result in a distortion and non-inclusion of tax revenues.

Thus, as the Belgian tax law only provides for a notional deduction, without requiring an application of the anti-hybrid rules, the high level of uncertainty regarding the interpretation of the term “payment” leads to significant challenges in the implementation of anti-hybrid rules aims to address the tax avoidance and tax evasion.

Furthermore, from a tax policy standpoint, it is clear that the interest on net equity should be included within the scope of anti-hybrid rules, not only due to its benefits for tax purposes, but also due to the tax treatment of foreign investors and the tax advantage to the company.

Finally, as to the second negative effect, the problem relies on the high risk of double taxation, which is the result of the international standard's failure to align the tax treatment of foreign investors and the tax advantage to the company. This is especially important because it is debatable whether the interest on net equity should be included within the scope of anti-hybrid rules, in light of the right to deduct the payment from the taxable profits of Brazilian companies.

In conclusion, the proposed anti-hybrid rules are a significant step towards the prevention of base erosion and profit shifting. However, the application of these rules should be carefully considered to ensure that they do not result in unintended consequences and that they are applied in a manner that is consistent with the principles of international tax law.
According to Stijn Vanoppen: "If there are insufficient profits to offset the available NID, any unused portion can be carried forward for seven years" (Vanoppen, Stijn, "Belgium National Report", The Debt-Equity Conundrum, Cahiers de Droit Fiscal International, Volume 97, International Fiscal Association, Rotterdam, Boston Congress, 2012, pp. 117-118).